92-939

No. _____

FILED
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In The

Supreme Court of the United States

October Term, 1992

SPANG & COMPANY,

Petitioner,

v.

MATTHEW A. DELGROSSO, JAMES P. BLAIR, LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RACZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, HUBERT J. LEE,

Respondents,

HONORABLE ALAN N. BLOCH,

Nominal Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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December 1, 1992

STATEMENT OF QUESTIONS PRESENTED

1. In an original mandamus action under the All Writs Act, may a court assess attorneys' fees against a private party respondent:

   (a) in the absence of statutory authorization for the award of attorneys' fees, and

   (b) where none of the judicially recognized exceptions to the "American Rule" precluding the assessment of attorneys' fees was present?

2. With respect to an appeal, may a court assess attorneys' fees against the prevailing party?

LIST OF PARTIES

All of the parties to the proceedings below are identified in the caption of this petition. Petitioner Spang & Company has no parent companies, subsidiaries or affiliates to identify pursuant to Rule 29.1.

TABLE OF CONTENTS

Page

STATEMENT OF QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

STATEMENT OF JURISDICTION 2

STATUTES INVOLVED IN THE CASE 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

Introduction 7

A. No Authority Exists To Award Attorneys' Fees In An Original Mandamus Action Under The All Writs Act 9

1. The Mandamus Action Was Not Prosecuted Under Title I Of ERISA 10

2. The Mandamus Action Was Directed To The Court's Conduct And Not To Any Conduct Of Spang 12

B. DelGrosso's Counsel Is Not Entitled To An Award Of Fees For The Unsuccessful Appeal 13

CONCLUSION 15

APPENDIX

Memorandum Opinion and Order of the Special Master, January 29, 1991 ..... 1a

Report and Recommendation of the Special Master, March 31, 1992 ..... 25a

TABLE OF CONTENTS – Continued

Page

Order of the Court of Appeals, July 20, 1992..... 94a

Order of the Court of Appeals, September 3, 1992 ..... 97a

TABLE OF AUTHORITIES

Page

CASES

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 8, 9, 11

Arizona v. U.S. District Court, 709 F.2d 521 (9th Cir. 1983) 11

Bittner v. Sadoff and Rudoy Industries, 728 F.2d 820, 829 (7th Cir. 1984) 14

Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 9

Cotler v. Inter-County Orthopaedic Ass'n., 530 F.2d 536 (3d Cir. 1976) 11

Davis v. Chicago Municipal Employees Credit Union, 891 F.2d 182 (7th Cir. 1989) 14

DelGrosso v. Spang & Company, 769 F.2d 928 (3d Cir. 1985) *cert. den'd*, 476 U.S. 1140 (1986) 4, 5

DelGrosso v. Spang & Company, 903 F.2d 234 (3d Cir. 1990) 5, 12

Marbury v. Madison, 5 U.S. 87, 1 Cranch 137 (1803) 10

Roche v. Evaporated Milk Ass'n., 319 U.S. 21 (1943) 12

Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983) 13

Summit Valley Ind., Inc. v. Local 112, 456 U.S. 717 (1982) 7, 8, 9

West Virginia University Hosp., Inc. v. Casey, ___ U.S. ___, 111 S.Ct. 1138 (U.S. 1991) 11, 12

TABLE OF AUTHORITIES – Continued

Page

STATUTES

The All Writs Act, 28 U.S.C. § 1651 ..... *passim*

Employee Retirement Income Security Act, 29 U.S.C. § 1132 ..... 3, 11

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Spang & Company respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in these proceedings on July 20, 1992.

OPINIONS BELOW

The orders of the court of appeals, the special master's report and recommendation and his memorandum opinion and order are not reported. All are reprinted in the Appendix hereto.

STATEMENT OF JURISDICTION

This petition relates to an appeal by respondents (Third Circuit docket no. 89-3573) which was dismissed for lack of appellate jurisdiction and a separate mandamus action initiated under the All Writs Act, 28 U.S.C. § 1651 (Third Circuit docket no. 89-3677) which was granted. Subsequent to the issuance of the writ of mandamus, respondents filed in the mandamus action an application for award of attorneys' fees. The Third Circuit awarded respondents attorneys' fees attributable to the mandamus action and the dismissed appeal.

The final order of the Third Circuit with respect to which review is requested was entered on July 20, 1992. The Third Circuit's Order denying the Petition for Rehearing and Suggestion for Rehearing In Banc filed by Spang & Company ("Spang") was entered on September 3, 1992.

This Court has jurisdiction to review the final order of the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1254(1), 28 U.S.C. § 2101 and Supreme Court Rules 13.1 and 13.4.

STATUTES INVOLVED IN THE CASE

1) 28 U.S.C. § 1651. Writs.

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> * * *

2) 29 U.S.C. § 1132. Employee Retirement Income Security Act – Civil Enforcement.

> * * *
>
> (g) Attorney's fees and costs; awards in action involving delinquent contributions
>
> (1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorneys' fee and costs of action to either party.
>
> * * *

STATEMENT OF THE CASE

Respondents, former employees of a closed industrial facility formerly operated by a division of Spang (collectively referred to herein as "DelGrosso"), filed in 1982 a four count action against Spang in the United States District Court For The Western District Of Pennsylvania asserting claims under the Employee Retirement Income

Security Act and other federal statutes not relevant here. Counts I and II of the Complaint requested damages and the immediate allocation of certain assets of a pension plan governed by a 1980 pension agreement between Spang and the bargaining unit representing Spang's former employees, including DelGrosso. Counts III and IV of the Complaint requested reformation of the pension plan and appointment of an independent plan administrator to oversee the plan. The district court entered summary judgment in favor of Spang on all counts of the Complaint. DelGrosso appealed to the United States Court of Appeals for the Third Circuit. The Third Circuit affirmed the district court's dismissal of DelGrosso's claims for damages and distribution of pension plan assets but reversed and remanded as to the counts seeking reformation of the pension plan and appointment of an independent administrator. The Third Circuit's remand to the district court included specific directions to the district court to enter summary judgment in favor of DelGrosso on those counts and take other specified action. *DelGrosso v. Spang & Company*, 769 F.2d 928 (3d Cir. 1985) *cert. den'd*, 476 U.S. 1140 (1986) (*"DelGrosso I"*).

Following the remand, the district court, on February 5, 1987, appointed, at DelGrosso's request, a certain individual as the independent plan administrator. That individual, however, refused to accept her appointment. DelGrosso did not recommend any other candidate for appointment. Nearly two and one-half years after the appointment of the independent administrator, the district court issued an administrative order dated July 18, 1989 directing the clerk of the district court to mark the case closed only as an administrative matter. DelGrosso

filed a notice of appeal in the Third Circuit purporting to appeal from the district court's administrative order, which appeal was docketed at no. 89-3573. Spang moved to dismiss the appeal on the grounds that DelGrosso was impermissibly seeking review of an interlocutory order. DelGrosso then commenced a separate mandamus action in the Third Circuit under the All Writs Act, 28 U.S.C. § 1651, at docket no. 89-3677.

The Third Circuit, by judgment dated May 17, 1990, dismissed the appeal on the basis that the administrative order of the district court was not final and thus was not appealable and assessed the costs of appeal against DelGrosso. In the All Writs Act mandamus action, the Third Circuit issued a writ of mandamus requiring the district court to carry out the mandate previously directed to the district court in *DelGrosso I*. The Third Circuit's opinion accompanying the judgment and writ of mandamus is set forth at *DelGrosso v. Spang & Company*, 903 F.2d 234 (3d Cir. 1990) ("*DelGrosso II*").

Following *DelGrosso II*, DelGrosso filed only in the All Writs Act mandamus action (no. 89-3677) an Application For An Award Of Attorneys' Fees And Expenses ("Fee Application"). Although the Fee Application was filed only in the All Writs Act action and notwithstanding the dismissal of the appeal (no. 89-3573) with the assessment of costs against DelGrosso, the Fee Application requested the assessment against Spang of DelGrosso's attorneys' fees and expenses both for the mandamus action and for the dismissed appeal. In response to the Fee Application, the Third Circuit appointed a special master to review the Fee Application and make an advisory recommendation as to its disposition.

The special master filed an advisory memorandum opinion dated January 29, 1991. In that advisory opinion, the special master:

(a) concluded that the action of the district court left the case "hopelessly stalled" because "the district court did not, on remand, implement the order" of the Third Circuit in *DelGrosso I*;

(b) concluded that the Third Circuit in *DelGrosso II* held that the "justification [for issuance of a writ of mandamus] is not the culpability of [Spang] but the failure of the district court to carry out the mandate of the appellate court"; and

(c) concluded that attorneys' fees and expenses should be assessed against Spang and in favor of DelGrosso with respect to both the mandamus action and the appeal.

The memorandum opinion also provided for the conducting of proceedings to determine the amount of fees to be awarded. Accordingly, evidentiary proceedings were conducted before the special master, following which the special master filed his report and recommendation dated March 15, 1992 setting forth his recommendation as to the amount of fees to be awarded. The Third Circuit issued its memorandum order dated July 20, 1992 which, without discussion, affirmed the recommendation of the special master and awarded to DelGrosso attorneys' fees and expenses incurred in connection with the mandamus action prosecuted pursuant to the All Writ Act (no. 89-3677) and the separate, dismissed appeal (no. 89-3573).

Spang timely filed a Petition for Rehearing and Suggestion for Rehearing In Banc. Both the petition and the suggestion were denied in the order of the Third Circuit dated September 3, 1992.

REASONS FOR GRANTING THE WRIT

Introduction

The order of the court of appeals is a radical departure from the "American Rule" precluding assessment of a party's attorneys' fees against another party. *See, generally, Summit Valley Ind., Inc. v. Local 112*, 456 U.S. 717 (1982). Unless corrected by this Court, the order below will stand as an open invitation to federal courts to create drastic new remedies regarding the award of attorneys' fees. In light of the increasing tendency of federal courts to exercise appellate jurisdiction by means of mandamus, there is a substantial probability that, unless checked, this abandonment of the American Rule will be oft-repeated. Accordingly, the mere denial of this Petition For a Writ of Certiorari will signal federal courts that they are free to abandon this Court's directives prohibiting the award of attorneys' fees in the absence of express statutory authorization.

The July 20, 1992 order of the Court of Appeals for the Third Circuit directed Spang to pay DelGrosso's attorneys' fees with respect to both a mandamus action prosecuted under the All Writs Act and also a separate appeal which was dismissed on jurisdictional grounds and on which, therefore, DelGrosso did not prevail. The All Writs Act does not contain any fee-shifting authorization. The

July 20, 1992 order, therefore, irreconcilably conflicts with applicable, controlling decisions of this Court and long-standing precedent reaffirming the American Rule which prohibits the award of attorneys' fees in the absence of express statutory authorization or a judicial determination that one of the narrow, judicially recognized exceptions to the American Rule applies to the underlying case.[1] The American Rule, of course, requires litigants to bear their own attorneys' fees. *Summit Valley Ind., supra.* By allowing the assessment of attorneys' fees against a private party respondent to a mandamus action under the All Writs Act, a statute containing no fee-shifting authorization, the Third Circuit has created doubt and confusion as to the adherence by federal courts to the American Rule.

The All Writs Act, 28 U.S.C. § 1651, pursuant to which DelGrosso prosecuted the mandamus action, simply does not authorize the shifting of a party's attorneys' fees to an adversary. Indeed, to Spang's knowledge, this case constitutes the first ever award of attorneys' fees in a mandamus action in comparable circumstances. The court below departed from the usual course of judicial proceedings in two respects: (i) by awarding attorneys' fees in an

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[1] The exceptions to the American Rule are limited to circumstances where the court determines that a party engaged in bad faith or vexatious conduct or wilfully violated a court order, or where the successful litigant creates a common fund for the benefit of others. *See, Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 257-58 (1975). DelGrosso did not contend, nor did the court below determine, that any of those considerations apply to either the mandamus action or the dismissed appeal.

action initiated pursuant to a statute containing no fee-shifting authorization and (ii) by awarding attorneys' fees in favor of a non-prevailing party (DelGrosso) and against a prevailing party (Spang) with respect to the DelGrosso's separate appeal at docket no. 89-3573.

A. No Authority Exists To Award Attorneys' Fees In An Original Mandamus Action Under The All Writs Act.

There can be no dispute that, absent specific statutory authorization or the applicability of a few, limited exceptions to the American Rule, litigants must pay their own counsel fees and a court cannot shift the burden of paying those fees to an opposing party. *Summit Valley Ind., supra; Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). This Court in *Alyeska* summarized the applicable law in language equally applicable here:

> In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser. We are asked to fashion a far-reaching exception to this "American Rule"; but having considered its origin and development, we are convinced that it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged by respondents and approved by the Court of Appeals.

421 U.S. at 247.

Thus, the court of appeals' reallocation of "the burdens of litigation" was directly contrary to this Court's mandatory directives limiting a court's prerogative to shift the burden of payment of a party's attorneys' fees to an adversary. The Third Circuit clearly has acted contrary to the controlling principle and pronouncement of this Court that it is "inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation," 421 U.S. at 247, and that (absent a few narrow exceptions) "it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making these awards are matters for Congress to determine," *id.* at 262, and that "courts are not free to fashion drastic new remedies with respect to the allowance" of attorneys' fees. *Id.* at 269. Here, the Fee Application was filed only in the mandamus action prosecuted under The All Writs Act. No authority exists to award attorneys' fees in a mandamus action under the All Writs Act. The court of appeals' award is directly contrary to this Court's binding directives precluding such awards in the context of actions lacking statutory authorization.

1. The Mandamus Action Was Not Prosecuted Under Title I Of ERISA.

The mandamus action was prosecuted pursuant to the All Writs Act, 28 U.S.C. § 1651. The action did not arise under and was not an action under Title I of ERISA. Fundamental and long-standing principles of law, still applicable today, establish that actions in mandamus are original actions at law. *Marbury v. Madison*, 5 U.S. 87, 110,

1 Cranch 137, 175-176 (1803); *Cotler v. Inter-County Orthopaedic Ass'n.*, 530 F.2d 536 (3d Cir. 1976); *Arizona v. U.S. District Court*, 709 F.2d 521 (9th Cir. 1983).

The fee-shifting authorization of ERISA, 29 U.S.C. § 1132, upon which the court relied, restricts a court's exercise of discretion to award attorneys' fees. Those fees may be awarded only in the limited circumstances of an "action *under this subchapter*" of ERISA.

The Third Circuit adopted without discussion the recommendation of the special master to award attorneys' fees with respect to the All Writs Act action. The rationale of the special master was that the mandamus action "was a necessary adjunct" to DelGrosso's impermissible attempt to review by appeal the purported failure of a district court to implement an appellate mandate (Report, p. 42a). The "necessary adjunct" rationale does violence to this Court's holding in *Alyeska* that courts do not have the prerogative to "fashion drastic new remedies" regarding the award of attorneys' fees in the absence of *express statutory authority* or a few exceptional circumstances (not applicable here) long recognized at common law. The court's resort to the "necessary adjunct" rationale itself demonstrates that the mandamus action was *not* a proceeding under ERISA.

Moreover, even where fee-shifting statutes exist, such statutes are to be strictly construed. *See, e.g., West Virginia University Hosp., Inc. v. Casey*, ___ U.S. ___, 111 S.Ct. 1138 (U.S. 1991). The Third Circuit ignored the express, unequivocal restriction on the awarding of attorneys' fees contained in the very statute relied upon by the court (ERISA, 28 U.S.C., § 1132) which directs that attorneys'

fees may be awarded only in "actions under this subchapter."

Congress chose to employ language restricting recovery of attorneys' fees to limited circumstances or actions – the courts are bound by those restrictions. *West Va. Univ. Hosp.*, 111 S.Ct. at 1147. In short, there simply is no authority to graft onto the separate All Writs Act mandamus action (which was not initiated under ERISA) the fee shifting provisions of ERISA.

2. The Mandamus Action Was Directed To The Court's Conduct And Not To Any Conduct Of Spang.

Writs of mandamus have traditionally been used in the federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n.*, 319 U.S. 21, 26 (1943). Even if an award of attorneys' fees were permissible under the All Writs Act because the mandamus action was related to separate ERISA proceedings, such an award of fees in this case would not be appropriate because the court of appeals determined that the mandamus action clearly was based on the district court's failure to carry out the court of appeals' explicit directives to the district court and not because of actions of Spang. These circumstances clearly do not fall within the limited exceptions to the American Rule.

In *DelGrosso II*, the Third Circuit held that "in this difficult and complex case, the district court has not fully implemented the judgment in *DelGrosso I*", concluding

that the district court "made it clear that it would not decide" the disputed issues and that its refusal to implement the judgment in *DelGrosso I* "has left the case hopelessly stalled." 903 F.2d at 235, 238. In short, the mandamus action was based on the action (or inaction) of the district court and not the conduct of Spang.

Moreover, principles of equity and fair play also require that attorneys' fees not be assessed against a private party respondent to a mandamus action whose purpose is to correct a purported error or nonfeasance of the district court and not of the private party.

B. DelGrosso's Counsel Is Not Entitled To An Award Of Fees For The Unsuccessful Appeal.

Even where statutory authorization for fee-shifting exists, a court may not require the prevailing party to pay the attorneys' fees incurred by the non-prevailing party. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983) ("It is clear that generations of American judges, lawyers, and legislators, with [the "American Rule"] as the point of departure would regard it as quite 'inappropriate' to award the 'loser' an attorneys' fee from the 'prevailing litigant' ").

DelGrosso's appeal at No. 89-3573 was dismissed by the Third Circuit for lack of jurisdiction on the grounds that DelGrosso was improperly seeking to appeal from a nonappealable order. In dismissing the appeal, the court assessed costs against DelGrosso. The July 20, 1992 order of the Third Circuit is not only inconsistent with its assessment of the costs of that appeal, but also and more importantly, contravenes this Court's prohibition against

assessing a non-prevailing party's attorneys' fees against a prevailing party. In addition, the July 20, 1992 order is directly in conflict with the decisions of other circuits denying fees to a non-prevailing party. *See, e.g., Davis v. Chicago Municipal Employees Credit Union*, 891 F.2d 182 (7th Cir. 1989) (party seeking attorneys' fee under ERISA must be a prevailing party); *Bittner v. Sadoff and Rudoy Industries*, 728 F.2d 820, 829 (7th Cir. 1984):

> After *Ruckelshaus v. Sierra Club*, it would be an abuse of discretion for the district court to award attorneys' fees to a losing party, even though section 1132(g)(1) does not in so many words confine awards of attorney's fees to winners, as the Civil Rights Attorney's Fees Awards Act does.

Here, the appeal resulted in an order favorable to Spang, not DelGrosso.[2] Despite this, the Third Circuit awarded DelGrosso attorneys' fees incurred in connection with the unsuccessful, dismissed appeal.

DelGrosso clearly failed to prevail on the appeal. The appeal was a proceeding separate from the mandamus action. The appellate court recognized that fact in its assessment of costs against DelGrosso with respect to the appeal.

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[2] DelGrosso apparently recognized the clear impropriety of any request for fees regarding the dismissed appeal and, accordingly, filed the Fee Application only in the mandamus action and not in the dismissed appeal.

CONCLUSION

For the reasons discussed above, the Petition for a Writ of Certiorari to correct and prevent repetition of the abandonment of the American Rule should be granted.

Respectfully submitted,

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December 1, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 89-3573 and 89-3677

MATTHEW A. DELGROSSO, ET AL.,

Petitioners

v.

SPANG & COMPANY,

Respondent

HONORABLE ALAN N. BLOCH, Nominal Respondent

On Petition for Writ of Mandamus
In the United States District Court
for the Western District of Pennsylvania
D.C. Civ. No. 82-2672

Before: Honorable Max Rosenn, Special Master
Opinion Filed

MEMORANDUM OPINION AND ORDER

ROSENN, Circuit Judge.

In *Delgrosso v. Spang and Company*, 769 F.2d 928 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986), (*Delgrosso I*), nonvested participants in a pension plan sought a ruling which would prevent their employer, Spang and Company, from appropriating to itself the surplus assets of a

pension fund and would instead order those assets to be distributed among nonvested participants. The United States District Court for the Western District of Pennsylvania granted summary judgment in favor of the employer and the plaintiff appealed. The court of appeals held that the employer breached its fiduciary duty under the Employee Retirement Income Security Act (ERISA) by unilaterally amending its pension plan to provide for reversion of the assets to Spang and Company in violation of the pension agreement. The court accordingly ordered reformation of the pension plan to bar the reversion.

The complaint filed by the plaintiffs contains four counts, the dismissal of the first two of which was affirmed by the court of appeals. The court of appeals, however, reversed the district court's order of August 29, 1984, granting summary judgment to Spang on counts III and IV and remanded with the following directions. It directed the district court to:

(1) grant summary judgment in favor of the plaintiffs on Counts III and IV;

(2) reform the Spang plan to provide that the reversion to Spang of the Fund surplus is barred;

(3) appoint a representative for the vested participants to represent them in the selection of an independent Plan administrator; and

(4) under appropriate procedures, appoint an independent administrator of the Plan in the place of Spang.[1] *Delgrosso I*, 769 F.2d at 938.

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[1] Count IV stated a cause of action under the Labor Management Relations Act (LMRA), section 301(a), 29 U.S.C. § 185(a).

The plaintiffs sought no different relief under count IV than they did under count III, and having resolved the ERISA claims for reformation and appointment of an administrator in place of Spang, the court held that no other relief was available to them under count IV.

Because the district court did not implement the order of the court of appeals on remand, as a result of which the case became "hopelessly stalled," leaving the Plan without an administrator and leaving the relief available to the nonvested participants on their summary judgment unclear, the plaintiffs again appealed to the court of appeals. The plaintiffs also petitioned the court of appeals for a writ of mandamus to compel the district court to comply with its earlier judgment in *Delgrosso I*. The court of appeals held that the order from which the appeal was taken was not final for purposes of section 1291 and accordingly dismissed the appeal, dividing the costs between the parties. The Supreme Court of the United States denied Spang's petition for certiorari.

The court of appeals, however, looked with favor on the petition for mandamus and held that the petitioner's allegations regarding the conduct of the district court were properly addressed through a petition for a writ of mandamus. Accordingly, it granted the petition for mandamus, No. 89-3677, and directed the district court to reopen the case, carry out each of the directives set out in the prior judgment of the court of appeals, and to issue appropriate orders with respect to each directive, all in accordance with its opinion in *Delgrosso I*. It further directed the district court to resolve all issues not expressly or implicitly disposed of by the court of appeals, as was necessary to effectuate the judgment and

in a manner consistent with its both [sic] opinions, including but not limited to questions involving the Chicago employees and whether Spang had appropriated any part of the surplus. This decision and order were filed May 17, 1990. *Delgrosso v. Spang and Co.*, 903 F.2d 234 (3d Cir.), *cert. denied*, 111 S.Ct. 428 (1990) (*Delgrosso II*).

On June 18, 1990, the court of appeals entered an order denying defendant's petition for rehearing en banc.

Pursuant to Third Circuit Rule 27(1), the appellants in *Delgrosso I* and the appellants and petitioners for mandamus in *Delgrosso II* filed an application on July 2, 1990, for an award of attorneys' fees and other expenses related to the proceedings in which they obtained favorable decisions from the court. Having prevailed only as to the petition for a writ of mandamus in *Delgrosso II*, the plaintiffs filed an application for an award of attorneys' fees pursuant to 29 U.S.C. § 1132(g)(1) for both the petition and appeal in *Delgrosso II* and for work done in *Delgrosso I*.[2] The appellants had not filed a petition for attorneys' fees in *Delgrosso I* after the disposition in that case.

The respondent, Spang and Company, filed written objections to the petition for attorneys' fees and expenses

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[2] 29 U.S.C. § 1132(g)(1) provides:

(g) Attorney's Fees and Costs; Awards and Actions Involving Delinquent Contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) [which concerns delinquent contributions] by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and cost of action to either party.

and raised many complicated issues of fact and law, and requested an evidentiary hearing. The court of appeals therefore appointed the undersigned as a Special Master to take testimony and hear evidence with respect to the issues raised by the application. At a pre-hearing conference held in Philadelphia on August 29, 1990, legal questions were raised immediately by counsel for Spang as to whether the plaintiffs were entitled to any award of attorneys' fees under section 502(g) of the ERISA statute. In an effort to expedite the proceedings and resolve the legal questions before the parties became engaged in further discovery and an evidentiary hearing, it was agreed that counsel would brief the legal issues. The disposition of the legal questions raised are now before the Special Master.

I.

Spang aims three major challenges at the heart of any claim of the petitioners for counsel fees and expenses. First, it contends that mandamus is an original action not directed to the respondents in the case but to a government officer who has failed to perform a required nondiscretionary duty. Thus, it asserts that there are justifiable legal and policy reasons for a denial in toto of a request for counsel fees and expenses in a mandamus proceeding. Second, it vigorously argues that petitioners' similar request for counsel fees in the appeal component of *Delgrosso II* should be denied because the court dismissed the appeal for lack of jurisdiction. Third, petitioners' request for counsel fees and expenses attributable to *Delgrosso I* should be denied because it was untimely

and not requested in the complaint. Each of these objections will be addressed in turn.

A. THE MANDAMUS ACTION

Petitioners allege that despite *Delgrosso I's* directives, Spang diverted 1.13 million dollars of the Plan surplus into a new plan while the case was on remand before the district court. Spang, it claims, accomplished this by creating two plans, a "Chicago plan" and a "Lorrain plan," where only one plan had previously existed; it then terminated the "Chicago plan" and retained its surplus of the 1.13 million dollars. When the petitioners requested the district court to declare Spang's conduct in violation of the appellate court's judgment in *Delgrosso I*, the district court declined and entered an order on July 18, 1989, closing the case, stating:

> Nothing contained in this order shall be considered a dismissal or disposition of this matter and, should further proceedings in it become necessary or desirable, either party may initiate it in the same manner as if the order had not been entered.

The district court's refusal to make the determinations required of it by *Delgrosso I* "left the case hopelessly stalled." *Delgrosso II*, 903 F.2d at 240.

Faced with the procedural dilemma posed by this unusual order, the petitioners, in an effort to obtain appellate review of the district court's order appealed under 28 U.S.C. § 1291 and, exercising jurisdictional caution under the circumstances, petitioned for a writ of mandamus. On motion of the petitioners, the appellate

court consolidated the proceedings and resolved them both in *Delgrosso II*. The court of appeals held that the order of the district court was not final and appealable under 28 U.S.C. § 1291 and therefore granted Spang's motion to dismiss the appeal (No. 89-3573). However, the court granted the petition for a writ of mandamus by opinion filed May 17, 1990, and directed the district court to reopen the case, to carry out each of the directives set out in its prior judgment in *Delgrosso I*, to issue appropriate orders with respect to each directive, all in accordance with its opinion and the previous opinion, *Delgrosso I*. It further directed that all issues not expressly or implicitly disposed of be resolved by the district court, as may be necessary to effectuate the judgment and in a manner consistent with both opinions. *Delgrosso II*, 903 F.2d at 242-43.

The petitioners thereupon filed their application for attorneys' fees and expenses in the amount of $163,731.64.

Spang forcefully argues that shifting of counsel fees and expenses in a mandamus action is impermissible and without precedent. There is no authority, it claims, that will support an award of attorneys' fees and expenses against a private party respondent when a writ of mandamus is required because a public official failed to exercise his or her mandatory authority. Spang asserts that mandamus focuses on the conduct of the district court and not on the litigants in the case, and is directed to a government official to determine whether he or she has abdicated a non-discretionary duty. The parties, it is asserted, have no control over the government's official exercise of his/her duty and that this is especially true

when, as here, the government official is a member of the federal judiciary. They contend that "it is not fair as a matter of public policy to require a litigant to pay attorneys' fees and expenses in connection with a writ of mandamus." It points out that in this case the mandamus petition was to compel the district court to carry out mandatory duties in response to the directives of the court in *Delgrosso I*.

Spang contends that research has disclosed no authority, much less binding precedent, that supports an award of attorneys' fees and expenses against a private party respondent in a writ of mandamus directed to a public official who has failed to exercise his/her mandatory authority. Although mandamus under the All Writs Act is an original proceeding, I do not believe that in the circumstances of this case we can treat it in a vacuum, discrete, and wholly separate from the underlying ERISA proceedings which evoked it. The writ was sought and granted in aid of the jurisdiction of the appellate court. *See Cotler v. Inter-County Orthopaedic Association, P.A.*, 530 F.2d 536, 538 (3d Cir. 1976).

When the district court closed the case without implementing the original decree of the court of appeals, petitioners had no choice but to seek appellate review. Apparently, realizing the difficulties involved in ascertaining whether the district court's order was final and appealable, their counsel judiciously appealed and contemporaneously sought mandamus. Both proceedings had as their purpose review of the district court's judgment; both sought similar review and objectives, the mandamus being precautionary and in support of the appellate court's jurisdiction. The respondent is correct in

maintaining that the writ of mandamus is not directed to Spang, and that its justification is not the culpability of a litigant but the failure of the district court to carry out the mandate of the appellate court and the implementation of the appellate court's decision with respect to counts III and IV of the complaint. Thus, the purpose and effect of the petition for mandamus was to obtain appellate review of the district court's action in closing the case in the face of an appellate court's direction to grant them the relief they sought under ERISA. However, the central issues in *Delgrosso II*, both in its appeal presentation under section 1291 and its mandamus component under the All Writs Act, focused entirely on the relief the petitioner sought under ERISA. Thus, the appeal and petition in effect were directed at remedying the conduct of Spang determined by the court of appeals to be unlawful under ERISA.

Courts have held that when an appeal and a petition for mandamus are directed at the same objective, costs for the petition may be awarded. In *Devine v. Sutermeister*, 733 F.2d 892 (7th Cir. 1984), the plaintiff union sought an award of attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412 (1982), for its successful defense against the Office of Personnel Management's appeal before the court. The Government had appealed from an arbitrator's award which changed a federal employee's permanent removal to a thirty-day suspension. The union filed a petition for mandamus to compel the government agency to reinstate the grievant as ordered by the arbitrator. The court dismissed the mandamus without prejudice on the ground that the denial of the government's motion for a stay would accomplish the writ's purpose. Even though the petition was denied, the

court still awarded fees to the union as to the writ of mandamus pursuant to EAJA. The court rationalized that the union prevailed because the denial of the stay effectively accomplished the purpose of the mandamus. *Id.* at 899. In the instant proceeding, the dispute concerning the writ of mandamus is an integral part of the central issue raised by petitioners under ERISA. The mandamus action was not discrete and independent of the relief sought by petitioners under ERISA. Petitioners clearly prevailed in the mandamus proceeding and in examining the objection to the application for attorneys' fees and expenses relating to the mandamus proceeding, a court should look to the substance of the litigation and not take a formalistic or technical view of the case. For this purpose, the substance of the relief secured should prevail over form. *See Morrison v. Ayoob,* 627 F.2d 669, 671 (3d Cir. 1980).

Although *Devine v. Sutermeister* involved the EAJA and not ERISA, both have fee shifting provisions with ERISA offering greater flexibility. The court has the discretion under ERISA to award fees without the limitation of first determining who is the "prevailing party" as required by the EAJA. Furthermore, the Court in *Hensley v. Esherhart* [sic], 461 U.S. 424 (1982), instructed that the standards set forth in that opinion are generally applicable in all cases in which Congress has authorized an award of fees to a "prevailing party." 461 U.S. at 433, n.7. There appears to be no reason why the same standards should not apply to the fee shifting provisions of ERISA.

This result is supported by the Third Circuit Court of Appeals' decision in *Cotler v. Inter-County Orthopaedic Ass'n, P.A.,* 530 F.2d 536 (3d Cir. 1976). There the court

was presented with a case of first impression by a successful applicant for a writ of mandamus requesting an assessment of costs against the actual respondent. As in *Delgrosso II*, the court found it lacked appellate jurisdiction because the orders appealed from were not final but that one of them was remediable by mandamus. It dismissed the appeal, but granted a writ of mandamus. The clerk of the court of appeals declined to assess costs for appellant because the appeal had been dismissed and because Rule 31 of the Federal Rules of Appellate Procedure made no provision for assessment of costs in a mandamus proceeding. Although the briefs on appeal argued the merits of the district court's orders, the court nonetheless allowed an assessment of costs as to briefs and appendix filed on appeal as were "addressed to matters properly considered on the mandamus." *Id.* at 538. The court observed that costs may not be taxed against the nominal respondent, the judge.

In *Ramon-Sepulveda v. I.N.S.*, 863 F.2d 1458 (9th Cir. 1988), the petitioner instituted a mandamus action seeking to terminate deportation proceedings against him on the ground that the issue had been determined previously in his favor and was now res judicata. After the court granted the writ and the proceeding terminated, the petitioner sought an award of attorneys' fees under the EAJA. The court of appeals granted the award holding that the government's position in the mandamus proceeding was not "substantially justified." The court of appeals concluded that a lack of judicial precedent adverse to the government's position did not preclude a fee award under the EAJA. *Id.* at 1459. *Also see Guerrero v. Marsh*, 819 F.2d 238, 242 (9th Cir. 1987). In the instant

case, petitioners' position is even stronger than the petitioners in *Guerrero* and *Ramon-Sepulveda* because it rests not on the mandamus action alone but on ERISA on which the mandamus action was predicated. The objection that the mandamus action will not permit an award of counsel fees and expenses is therefore denied.

B. DELGROSSO II APPEAL

Turning now to Spang's objection to an award of attorneys' fees and costs in the appeal component of *Delgrosso II*, much of the rationale underlying the denial of the objection to the mandamus appears to apply to this objection. The essence of this objection is that the court dismissed the appeal component by *Delgrosso II* and assessed costs against the petitioners. Spang contends that the appeal pursued a course independent of the mandamus, patently from a non-final order, and contrary to the law of the Third Circuit, citing *Patten Securities Corp. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400, 403 (3d Cir. 1987). The issue in *Patten Securities* involved an appeal from a simple order denying a motion to stay contractual arbitration, an issue which the Third Circuit Court of Appeals, as well as other circuits, has repeatedly held was an interlocutory order not appealable under section 1291(a)(1) as the denial of an injunction. *Id.* at 403. In this case, the court of appeals found the order of the district court not so simple to interpret. It concluded that "[o]n balance . . . we believe that the order is not final for purpose of § 1291," and that the issues raised be properly addressed through a petition for a writ of mandamus. *Delgrosso II*, 903 F.2d at 236. The court readily recognized

the intertwining of the appeal and the mandamus petition, notwithstanding its assessment of the appeal costs to the petitioners.

Both components of *Delgrosso II* arise out of a common nucleus of operative facts. As previously stated, both were procedural tools to achieve a common purpose – the review of the district court's order closing the case. They both were part and parcel of a single matter, the fundament of which was the violation of the participant's rights under the Plan. In *Hensley v. Eckerhart*, 461 U.S. 424 (1982), the Court considered the troublesome question of attorney fees, inter alia, when in one lawsuit distinctly different claims for relief are presented but which are based on different facts and legal theories. The Court stated that the Congressional intent to limit awards to prevailing parties required that the unrelated claims be treated as if they had been raised in separate lawsuits, and no fee therefore would be awarded for services rendered on the unsuccessful claim. *Id.* at 435. Here, we have the converse situation – an appeal and a separate mandamus petition, but both seeking appellate review of the same district court order and both involving a common core of facts and related legal theories.

> Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead, the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

* * *

> Litigation in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

Id. at 435.

Viewed in this light, the work performed by counsel in the appeal and mandamus was not discrete and separate, but intertwined in the successful common objective to obtain appellate review. Therefore, the objection to an award of attorneys' fees for the appeal component of *Delgrosso II* is denied. Because the court of appeals taxed costs in that appeal, there is no need to assess them here. I now turn to application for counsel fees and costs in *Delgrosso I.*

C. DELGROSSO I

As noted above, petitioners' original complaint alleged four counts, all of which were rejected by the district court. The court entered summary judgment for Spang. On appeal by the plaintiffs, the court of appeals affirmed the entry of summary judgment on counts I and II in favor of Spang because these counts essentially sought to have all surplus assets distributed to the non-vested participants such as Delgrosso. However, it reversed the district court as to counts III and IV because it held that Spang could not implement a plan which allowed reversion of assets to itself and that by doing so, Spang breached its fiduciary responsibilities under ERISA. Plaintiffs sought attorneys' fees under counts I

and II but they made no similar request in counts III and IV. The court of appeals filed its opinion in the case on July 30, 1985, and amended it on August 14 and October 31, 1985. The petitioners made no claim for attorneys' fees and expenses in connection with that appeal until they filed the current application.

Spang urges that petitioners' claim for attorneys' fees and expenses incurred in connection with *Delgrosso I* should be rejected because first, the petitioners failed to present their application timely, not having done so until they filed in the instant application on July 2, 1990. Secondly, the complaint made no request for fees in the two counts on which the petitioners were successful, and count IV deals with relief under the Labor Management Relations Act, 29 U.S.C. § 185, which has no provision for the shifting of attorneys' fees. Finally, Spang asserts that the petitioners did not prevail in the appeal in *Delgrosso I* because Spang was victorious on two of the counts and in recognition thereof the court of appeals divided the costs.

The most serious and perhaps determinative objection is the one pertaining to the timeliness of the application for fees. Petitioners did not present their application for expenses and fees until four years following the court of appeals' decision.

Effective January 1, 1987, Rule 27 of the Court of Appeals for the Third Circuit provided in pertinent part:

> Except as otherwise provided by statute, all applications for an award of attorney's fees and other expenses relating to a case filed in this court, irrespective of the source of authority for assessment, shall be filed within 30 days after the entry of this court's judgment. . . . Such

> appeal shall be filed with the Clerk of the court in the time set forth above whether or not the parties seek further action in the case or further review from any court.
>
> The time set forth will be strictly adhered to and exceptions will be granted only in exceptional circumstances.

Prior to the adoption of the above rule, the rules in the circuit implementing the provisions of the EAJA likewise required applications for attorneys' fees and expenses under that Act to be filed within thirty days after the entry of final judgment in the action. Even prior to the 1980's, the filing of application for fees under various fee shifting statutes was not unknown in the Third Circuit and the court of appeals developed guidelines for determining the appropriateness of such applications. *Lindy Brothers Builders v. American Radiator & Standard Corp.*, 487 F.2d 161 (3d Cir. 1973); *Atlantic & Gulf Stevedores v. Director, Etc.*, 542 F.2d 602 (3d Cir. 1976). *See also Prandini v. National Tea Co.*, 585 F.2d 47 (3d Cir. 1978); *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978); *Bagby v. Beal*, 606 F.2d 411 (3d Cir. 1979). In the absence of a rule of court, the court of appeals of this circuit granted an award of counsel fees under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50. In *Atlantic & Gulf Stevedores*, 542 F.2d at 610, the court reiterated a procedure set forth in *Lindy Brothers* in 1973 which dealt with an award of attorney's fees under the equitable fund doctrine in antitrust cases. That procedure required, inter alia, an application by motion "to the same panel which heard the appeal." The court again reiterated this procedure in *Vasquez v. Fleming*, 617

F.2d 334, 336 (3d Cir. 1980). This requirement of or the presentation of application "to the same panel which heard the appeal" has significance because the panel that heard the appeal would have familiarity with the services performed, the quality of advocacy, and the competence of counsel. Because panels are generally reconstituted for each sitting, the members usually change. Thus, the presentation of the application with reasonable promptness is important to the court and to panel members. Rule 27 of the Third Circuit Court of Appeals reemphasized this objective by requiring parties to submit fee requests within thirty days after the court's judgment while the case is still fresh in the panel members' minds.

Petitioners contend that (1) no rule of court existed at the time the court of appeals entered its judgment in *Delgrosso I*, and (2) Spang cannot point to any prejudice by the delay. Regardless of the absence of prejudice to the parties, the timeliness of the application for the fees and expenses serves a very useful and important purpose for the court and the litigants. As the court announced to the bar in 1976 in *Atlantic & Gulf*, an application for fees should be made to "the same panel which heard the appeal." *Atlantic & Gulf*, 542 F.2d at 610. Presumably, this is to assure an adjudication of the matter by the panel, if possible, that heard the merits of the underlying appellate case, that was familiar with the simplicity or complexity of the legal issues, and the quality and extent of performance of prevailing counsel. This facilitates an understanding and familiarity with the case, the issues, and the facts by the panel considering the fee petition.

One can hardly expect to assemble the same panel four to five years later. This case demonstrates the point:

no judge who sat on the panel in *Delgrosso II* was a member of the panel of *Delgrosso I*. Even if a judge were, that judge would be required after a number of years to recollect facts, persons, legal issues, and law, an onerous burden indeed for busy judges with heavy, pressing court calendars. Digesting of a cold meal, or even one warmed over, is not only unappetizing, but downright unpleasant. Another review of a case years after it has been heard, argued, and closed is not only accompanied by the same disagreeable symptoms that accompany the consumption of a cold dinner, but the lapse of time magnifies the problems of legal analysis, factual presentations, and familiarity with the record of the case. Thus, the rule that fee petitions should ordinarily be heard soon after the disposition of an appeal by the same panel serves important institutional purposes.

There remains the question of, absent a local rule, how late is too late for a fee petition? In *White v. New Hampshire Department of Employment*, 679 F.2d 283 (1st Cir. 1982), the court, in the absence of a local rule of court, held that the determination of timeliness under the Civil Rights Attorneys Fees Award Act, 42 U.S.C.A. § 1988, rested within the sound discretion of the district court. *Accord Inmates of Allegheny County Jail v. Pierce*, 716 F.2d 177 (3d Cir. 1983). It found that the delay there of approximately 4 and one-half months after the entry of a consent decree was "considerable," but not so extreme given all the other circumstances of the case, as to require a finding that the request was untimely. *Id.* at 285. In *Gordon v. Heimann*, 715 F.2d 531 (11th Cir. 1983), the court held that in the absence of a rule or statutory requirement, the application for fees should be made by motion "within a

reasonable period of time after the final judgment in a case." *Id.* at 538. *See Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820 (7th Cir. 1984) (motion for fees under ERISA within fourteen days after judgment held timely). In this case, the application for fees for *Delgrosso I* was not presented within days or months or even one or two years, but considerably later.

Petitioners were on notice from previous cases in this circuit and the subsequent adoption of Rule 27 by the court of appeals, as amended effective January 1, 1987, that the timely filing of an application was important and that the court had fixed an outer deadline of thirty days after the January 1, 1987, as the effective date of the Rule. Yet, petitioners did not proceed on their *Delgrosso I* application until three and one-half years after the adoption of this amended rule. In the absence of a court rule when the court entered its judgment in that case in 1985, it appears that the standard to be applied is that the application had to be filed within a reasonable time. This application for fees for services rendered in *Delgrosso I* was not filed within a reasonable time and the excuse that the proceedings, in view of the directives from the appellate court, continued to be ongoing in the district court is unacceptable. The proceedings in the appellate court had been completed long before. The objection to the request for attorneys' fees and expenses for *Delgrosso I* therefore is sustained. In light of this result, there is no need to reach the remaining objections raised by Spang as to this phase of the application.

III. GENERAL OBJECTIONS

Spang also raises some "shotgun" objections to any allowance of attorneys' fees and expenses.

Spang argues:

(1) Petitioners did not request fees and expenses in the only counts of the complaint on which they prevailed in *Delgrosso* (counts III and IV), nor did they attempt to amend the complaint to include such a request. In response to petitioner's objections that a disallowance on this ground would be improper because of their general prayer for "other relief" and their prayer for fees in counts I and II, Spang points to the American rule under which attorneys' fees traditionally are not recoverable unless in exceptional cases. Spang cites *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975). The petitioners in *Alyeska*, unlike those in these proceedings, did not have the benefit of a fee-shifting statute. The Court there pointed out that only Congress, not the courts, can authorize an exception to the American rule. Here, Congress has authorized such an exception when it enacted section 502(g)(1) of ERISA, 29 U.S.C. § 1132(1). The enactment of this section also provides petitioners with a sufficient basis for the claim for attorneys' fees without a specific request therefor in their complaint. Because of the fee shifting statute, the fundament for the fee allowance is not the complaint but the statute. This objection is therefore denied.

(2) Spang further contends that the application for fees and expenses pursuant to section 502(g)(1) should be denied because the purpose of that section is not

advanced when the petitioners are members of a powerful labor union with a legal staff which has the power and implicitly the resources to represent them. Spang continues its argument with the assertion that because petitioners' underlying claims here are based on a breach of the 1980 "Lorain" pension agreement, "it is most likely that the Union had a duty to represent the petitioners." Assuming the union has the duty and the resources to represent its members, this is not a valid reason to deny the petitioners' reasonable attorneys' fees and expenses in litigation they initiated and in which they achieved a substantial measure of success. Congress did not impose the limitations suggested here by Spang when it enacted the fee-shifting provision of ERISA. Although the statute limits the filing of an action to a participant, beneficiary, or fiduciary, there is no restriction as to counsel. In the final instance, the allowance of the fees and costs depends upon the discretion of the court.

(3) Finally, Spang argues that the fee request should be denied because the underlying claim in counts III and IV is actually for a breach of a collective bargaining agreement. Spang breached the pension agreement by drafting it with a provision inconsistent with the collective bargaining agreement. This being so, the Labor Management Relations Act does not authorize an award of attorneys' fees or expenses and therefore, Spang contends, petitioners' request should be denied. A brief and sufficient answer is that the court in *Delgrosso I* found that Spang breached its fiduciary duty under ERISA by unilaterally amending its pension plan to provide for revision of assets to the employer in violation of the

government Pension Agreement. It did not rest its decision on the Labor Management Relations Act. 769 F.2d at 934-936.

The foregoing objections are without merit, and they are denied.

IV. FEES AND EXPENSES ATTRIBUTABLE TO JOHN J. KEARNS III

Petitioners seek attorneys' fees and expenses for services allegedly rendered by Kearns in connection with *Delgrosso II*. Spang objects to any allowance to Kearns because he was a gratuitous volunteer. Kearns was appointed under the direction of the court of appeals pursuant to its decision in *Delgrosso I*, as "a representative for the vested participants to represent them *in the selection of an independent Plan administrator.*" 769 F.2d at 939 (emphasis added). He was not appointed to act as counsel as alleged in paragraph 10(e) of the application. Furthermore, the fee shifting statute only allows "attorney's fees and costs of action," not for the services in the selection of a pension plan administrator or gratuitous legal services in the appellate court. The participants in Delgrosso II already had competent and experienced counsel who were fully familiar with the trial record, the previous proceedings, both in the district court and the court of appeals. The Court of Appeals for the Third Circuit looks with disfavor on the payment of fees for duplicative and unnecessary counsel. *See West Virginia University Hospital, Inc. v. Casey*, 898 F.2d 357, 365 (3d Cir. 1990). Accordingly, the application for fees and expenses attributable to Kearns is denied.

V. SUMMARY

In summary, the request for attorneys' fees and expenses in *Delgrosso I* is denied. The request for attorneys' fees and expenses in *Delgrosso II* is allowed, both as to the appeal and mandamus components, to the extent that the fees and expenses will be determined after hearing to be reasonable, necessary, and non-duplicative. Costs in the appeal and mandamus proceedings have already been resolved by the court of appeals and are not before us. The application for attorneys' fees and expenses for John J. Kearns in the proceedings in *Delgrosso II* is denied.

As to so much of the petitioners' request that is not denied, the parties are afforded discovery which shall be completed within thirty days of the date of this decision. In connection therewith, petitioners indicated at the conference held with the Special Master on August 29, 1990, that generally they had no objection to the request of Spang for the production of relevant requested documents in connection with the fee application. Although counsel for petitioners withheld their response to Spang's written request for listed documents pending disposition of the legal issues, counsel in this matter are experienced and appear to be reasonable and the Special Master is confident that discovery will proceed quickly, without difficulty, and without need at this time to hear further argument with respect to the documents to be produced. Upon completion of discovery, the Special Master will upon appropriate motion and notice fix a date, time, and place for hearing.

The foregoing summary is the Order of the Special Master.

/s/ Max Rosenn, S.J.
Special Master

Dated: January 29, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 89-3573 and 89-3677

MATTHEW A. DELGROSSO, ET AL.,

Petitioners

v.

SPANG & COMPANY,

Respondent

HONORABLE ALAN H. BLOCH,
Nominal Respondent

On Petition for Writ of Mandamus
In the United States District Court
for the Western District of Pennsylvania
D.C. Civ. No. 82-2672

Before: Honorable Max Rosenn, Special Master

SPECIAL MASTER'S REPORT

INDEX

PAGE

I. Background of Fee Application 3
II. The Pre-Hearing Proceedings 6
III. The Hearings 9
A. Objections 9
B. Discussion 12
IV. Pre-Fee Application Hours 22
V. Fee Application Hours 26
A. McIntyre's Claim for Hours 31
B. Payne's Claim for Hours 34
C. Kathryn Simpson 39
D. Michael D. Fox 40
E. The Hourly Rate 41
F. The Updated Claim Through August 21, 1991 56
(1) Fees 56
(2) Expenses 61
VI. Multiplier 62
VII. Conclusions of Law 66
VIII. Conclusion 74

I. BACKGROUND OF FEE APPLICATION

In *Delgrosso v. Spang and Company*, 769 F.2d 928 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986), (*Delgrosso I*), nonvested participants in a pension plan sought a ruling which would prevent their employer, Spang and Company (Spang), from appropriating to itself the surplus

assets of a pension fund and would instead order those assets to be distributed among nonvested participants. The United States District Court for the Western District of Pennsylvania granted summary judgment in favor of the employer and the plaintiff appealed. The court of appeals held that the employer breached its fiduciary duty under the Employee Retirement Income Security Act (ERISA) by unilaterally amending its pension plan to provide for reversion of the assets to Spang in violation of the pension agreement. The court accordingly ordered reformation of the pension plan to bar the reversion.

In remanding to the district court, the court of appeals directed the grant of summary judgment in favor of the plaintiffs on counts III and IV, reformation of the Spang plan to provide that the reversion to Spang of the Fund surplus is barred; appointment of a representative to represent the vested participants in the selection of an independent Plan administrator; and under appropriate procedures, the appointment of an independent administrator of the Plan to replace Spang. The court of appeals affirmed the entry of summary judgment on counts I and II in favor of Spang "because these counts essentially sought to have all surplus assets distributed to the nonvested participants such as DelGrosso." 769 F.2d at 938.

Because the district court did not, on remand, implement the order of the court of appeals as a result of which the case became "hopelessly stalled," leaving the Plan without an administrator and leaving the relief available to the nonvested participants on their summary judgment unclear, the plaintiffs again appealed to the court of appeals to No. 89-3573. The plaintiffs also petitioned the court of appeals for a writ of mandamus to compel the

district court to comply with its earlier judgment in *Delgrosso I*. Both proceedings were consolidated for oral argument. The court of appeals held that the order from which the appeal was taken was not final for purposes of section 1291 and accordingly dismissed the appeal, dividing the costs between the parties. The Supreme Court of the United States denied Spang's petition for certiorari.

The court of appeals, however, looked with favor on the petition for mandamus and held that the petitioners' allegations regarding the conduct of the district court were properly addressed through a petition for a writ of mandamus. Accordingly, it granted the prayer of the petition for mandamus, No. 89-3677, and directed the district court to reopen the case, to carry out each of the directives set forth in the prior judgment of the court of appeals, and to issue appropriate orders with respect to each directive, all in accordance with its opinion in *Delgrosso I*. It further directed the district court to resolve all issues not expressly or implicitly disposed of by the court of appeals, as were necessary to effectuate the judgment and in a manner consistent with both of its opinions, including but not limited to questions involving the Chicago employees and whether Spang had appropriated any part of the surplus. This decision and order were filed on May 17, 1990, with costs taxed against Spang. *Delgrosso v. Spang and Co.*, 903 F.2d 234 (3d Cir.), *cert. denied*, 111 S.Ct. 428 (1990) (*Delgrosso II*). The court of appeals denied defendant's petition for rehearing en banc.

Pursuant to Third Circuit Rule 27(1), the appellants in *Delgrosso I* and the appellants and petitioners for mandamus in *Delgrosso II* filed an application on July 2, 1990,

for an award of attorneys' fees and other expenses related to the proceedings in which they obtained favorable decisions from the court. The plaintiffs filed their application for attorneys' fees pursuant to 29 U.S.C. § 1132(g)(1) for both the mandamus petition and appeal in *Delgrosso II* and for services performed in *Delgrosso I*.[1] The appellants had not filed an application for attorneys' fees in *Delgrosso I* after the disposition in that case.

The respondent Spang filed written objections to the application for an award of attorneys' fees and expenses, raising many complicated issues of fact and law, and requested an evidentiary hearing. The court of appeals by order dated August 12, 1990, appointed the undersigned as a Special Master to take testimony, hear evidence with respect to the issues raised by the application, and report thereon with his recommendations as to findings of fact and conclusions of law.

II. THE PRE-HEARING PROCEEDINGS

At the pre-hearing conference held at the United States Courthouse in Philadelphia on August 29, 1990, Daniel P. McIntyre, Esquire, a sole practitioner, appeared

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[1] 29 U.S.C. § 1132(g)(1) provides:

(g) Attorney's Fees and Costs; Awards and Actions Involving Delinquent Contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) [which concerns delinquent contributions] by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and cost of action to either party.

for the petitioners, and John Iole, Esquire, of Jones, Day, Reavis & Pogue, together with William T. Marsh, Vice President and General Counsel for the employer, appeared for Spang. Efforts were made to simplify the issues, to facilitate discovery and the production of evidence, and to expedite the hearing. Counsel for Spang also raised serious legal objections as to whether the plaintiffs were entitled to any award of attorneys' fees under section 502(g) of the ERISA statute. Although the Master believed that his primary duty was to take evidence and make findings of fact and conclusions of law, the parties and the Master believed that it would expedite and possibly narrow the discovery and evidentiary proceedings if several legal questions raised were addressed preliminarily. The Master concluded that under the broad powers granted him in paragraph 3 of the Order of Reference, and the necessity of resolving the legal issues in an attempt to effectuate the purpose of the order, he was empowered to address these legal issues, subject, of course, to review by the court of appeals. The Master understands that his report with his disposition of the legal issues is merely advisory and that the court itself will determine the ultimate award, if any, to be made.

Spang raised three legal objections to the core of petitioners' claim for counsel fees and expenses. First, Spang contends that mandamus is an original action not directed to the respondents but to a government officer, the district judge, who had failed to perform a required discretionary duty. Thus, it asserts that there were justifiable legal and policy reasons for a denial in toto of a request for counsel fees and expenses in a mandamus proceeding. Second, it vigorously argues that petitioners'

similar request for counsel fees in the appeal component of *Delgrosso II* should be denied because the court dismissed the appeal for lack of jurisdiction. Third, Spang claims that petitioners' request for counsel fees and expenses attributable to *Delgrosso I* should be denied because it was untimely and not requested in the complaint.

The Master, by memorandum opinion dated January 31, 1991, denied the request for attorney's fees and expenses in *Delgrosso I* as untimely. He allowed the request for attorney's fees and expenses in *Delgrosso II*, both as to the appeal and mandamus components, to the extent that the fees and expenses would be determined after hearing to be reasonable, necessary, and non-duplicative. He denied the application for attorney's fees and expenses for John J. Kearns in the proceedings in *Delgrosso II*. The Master did not reach the question with respect to costs in the appeal and mandamus proceedings because they already had been resolved by the court of appeals. As to that part of the petitioners' request that was allowed, the Master afforded the parties discovery and directed that it be completed within thirty days of the date of his decision, and that upon the completion of discovery, he would, upon appropriate motion, set a date, time, and place for a hearing. The original memorandum opinion of the Master pertaining to the foregoing legal issues is being transmitted simultaneously with this report and the transcript of the hearings and exhibits to the Clerk of the Court for filing. Copies of the memorandum opinion were served upon counsel for the parties on January 31, 1991, and shortly thereafter distributed to the panel, and therefore do not accompany this report.

At the preliminary hearing, the Master reminded counsel that the matter before him was ancillary and collateral to the underlying controversy and requested that they carefully refrain from making it a major controversy. Regrettably, this plea received scant attention, discovery became protracted, and the proceedings fed upon themselves and expanded.

By letter dated April 16, 1991, the Master informed counsel for the parties that unless discovery would be complied with on or before May 20, 1991, the culpable party should anticipate the imposition of sanctions. On May 8, 1991, counsel for the petitioners and respondent filed separate motions to compel discovery with supporting legal memoranda. By order dated May 22, 1991, the Master disposed of the motion to compel discovery. Spang moved for reconsideration of the Master's order denying its motion which the Master denied.

On May 22, 1991, the Master also issued sua sponte a rule on the parties to show cause returnable within fifteen days why sanctions should not be imposed upon them for failure to conclude discovery. The parties filed timely answers to the order to show cause and after consideration of same the Master discharged the rule to show cause. By letter dated July 29, 1991, Spang moved to reconsider and vacate the Master's order to produce which was denied on the same date.

III. THE HEARINGS

A. Objections

The Master conducted the first hearing for the purpose of taking testimony on the application for attorneys'

fees and expenses at the United States Courthouse, Wilkes-Barre, Pennsylvania, on July 23, 1991. Daniel P. McIntyre, Esquire, appeared for petitioners, and Kevin P. Lucas, Esquire, of Manion, McDonough & Lucas, and William T. Marsh, Vice President and General Counsel of Spang, appeared for respondent. The evidence consisted of documents and exhibits offered into evidence by counsel for the petitioners and the testimony of William T. Marsh on behalf of Spang. Additional evidence was taken on Monday, August 5, 1991, at the same place. In addition to counsel at the previous hearing, William T. Payne of Schwartz, Steinsapir, Dohrmann & Sommers, Los Angeles, California, appeared on behalf of petitioners and also gave oral testimony. Upon the conclusion of the hearings, both sides submitted proposed findings of fact and conclusions of law within fifteen days. An additional fourteen days were allowed for the filing of briefs.

This is the classic case of the tail wagging the dog. Despite the Master's admonition at the pre-hearing conference, counsel for both parties spent considerably more time in the ancillary fee application proceedings than they did in presenting the underlying case in *Delgrosso II* commencing with the notice of appeal and the filing of the petition for mandamus. In these collateral fee proceedings, in addition to the two full days of testimony and much of another day in the prehearing conference, numerous exhibits, motions, and proposed findings of fact and conclusions of law were submitted by the applicants and the respondent. The passions evidently generated by the underlying proceedings remained undiminished throughout this ancillary phase of the case.

In addition to the legal arguments raised at the pre-hearing conference to the allowance of any legal fees to plaintiff's counsel, Spang alternatively raised a series of objections at the hearings which were bitterly contested by the petitioners. Besides numerous subordinate fee related objections, Spang raised the following issues:

(1) The plaintiffs did not prevail in these proceedings.

(2) The allowance of any fees to Payne for the period commencing with the proceedings until July 5, 1991, because he was competent to represent the plaintiffs in these proceeding without additional counsel. Because all of Payne's services were performed within the course and scope of his employment as assistant general counsel with USW, Spang claims that no other counsel should be entitled to fees and Payne should be allowed to recover for USW only his salary paid during this litigation and the cost of his overhead.

(3) The payment of market rates based upon ERISA expertise for services rendered in the mandamus proceeding which, Spang argues, involved nothing more than general appellate practice; that any attorney's fee award based upon prevailing market rates should be made with reference to general litigation practice and not to any supposed ERISA practice or expertise. Spang further objected to the failure of the plaintiffs to break out the amount of time addressed to the appeal as distinguished from the mandamus proceeding.

(4) The excessiveness of the number of hours allegedly expended in these proceedings and the hourly rates claimed by counsel for plaintiffs.

(5) The payment of any multiplier and, if the Master were to recommend any award in this case, a minimum of 33% negative multiplier should be applied because the plaintiffs submitted excessive, redundant, unnecessary hours without sufficiently detailed records and proper explanations.

B. Discussion

I turn now to the first issue above mentioned. "Whether petitioners' counsel are at all entitled to such an award of attorneys' fees and expenses" was the subject of specific and extensive briefing in connection with Spang's earlier legal objection to any award of legal fees. Numerous objections were raised by Spang to such an award. In my memorandum opinion of January 29, 1991, I found that the petitioners "clearly prevailed in the mandamus proceeding." Mem. Op. at 10. I concluded that the request for attorneys' fees and expenses in *Delgrosso II* should be allowed, but denied as to *Delgrosso I*, to the extent that fees and expenses are determined after hearing to be reasonable, necessary, and non-duplicative. Costs in the appeal and mandamus proceedings had already been resolved by the court of appeals and were not before the Master. No evidence has been submitted to change my position.

Turning to the second issue raised above, Payne avers in his supporting affidavit that he was an attorney employed in the legal department of the USW "with primary responsibility for ERISA litigation". The parties stipulated (para. 8, Jt. Exh. 1) that up until July 5, 1991, Payne rendered his services in these proceedings while

employed by USW and mostly at its offices, with its consent and within the scope of his employment.[2] While so employed, he claims he never charged an hourly rate to a client but represented others than USW only on a contingency fee basis. The parties further stipulated that any attorney's fee award to Payne from services prior to July 5, 1991, would be paid directly to the USW "unless the Court directs the USW to create a separate fund to hold the award for payment of legal expenses." (para. 9, Jt. Exh. 1). Payne and his co-counsel, McIntyre, also agreed with their clients that they would not charge them any fees in these proceedings but would rely entirely upon an award from the court. (Para. 12, Jt. Exh. 1).

Spang contends that "any fee award to a salaried union attorney must be based on the attorney's salary plus overhead expenses actually incurred by the union." In support of this argument, Spang asserts that when a union promotes the claims of specific individual non-member employees, as in this case, the latter must pay his/her fair share of the cost of union activities attributable to negotiation and the administration of the collective bargaining agreement. "That fair share is based on the Union's *actual costs*." Thus, analogizing, if a union cannot charge an unwilling non-beneficiary more than actual costs in that situation, it should not be permitted to do so in this situation and upset the delicate balance that Congress seeks to maintain between unionized employers and employees.

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[2] Petitioners did not submit any evidence as to the amount of Payne's salary or other compensation or allocable overhead with respect to his services prior to July 5, 1991, when he commenced the private practice of law.

In *Johnson v. Orr*, 739 F. Supp. 945 (D.N.J. 1988), *appeal dismissed*, 897 F.2d 128 (3d Cir. 1990), the district court accepted the reasoning of a line of cases from the Federal Circuit which held that unions could only recover the actual expenses incurred by their legal department and not the market rate fees received by private law firms. On appeal to the United States Court of Appeals for the Third Circuit, the court did not decide the issue but dismissed the appeal as untimely. However, the Federal Circuit held in *Devine v. National Treasury Employees Union*, 805 F.2d 384 (Fed. Cir. 1986), *cert. denied*, 484 U.S. 815 (1987), that the union in that case, a non-profit organization whose charter permitted it to provide more than legal services, could not recover more than its overhead expenses and the cost of its attorneys' fees. Thus, the district court in *Johnson* and the court of appeals in *Devine* support Spang's position on this issue.

The essence of the Devine court's rationale depended on the reasoning of the court in *National Treasury Employees Union v. Department of the Treasury*, 656 F.2d 848 (D.C. Cir. 1981), where the court held that payment of fees to a union that provides more than the legal services to a litigating party may violate the American Bar Association Code of Professional Responsibility, Disciplinary Rule (DR) 2-103(D)[sic]H)(a). That rule prohibits the splitting of fees by attorneys with laymen or lay organizations in the unauthorized practice of law. *See Devine*, 805 F.2d at 387 and cases cited therein.

On the other hand, the petitioners argue that a union owes no duty to a former member, which is the situation here, with respect to independent statutory rights. Congress, the petitioners claim, conferred these rights

directly upon individuals and their enforcement rests entirely with the individuals who are in no way limited in enforcing their rights under ERISA. Indeed, they argue, ERISA explicitly recognizes an individual's rights as a participant, to enforce the statute protections. 19 U.S.C. § 1132(a). Petitioners, therefore, conclude that Spang "is simply wrong when it contends that the law independently required the Steelworkers to provide the services at issue". (Pet. Post-Hearing Brief, pp. 15-16).

It appears that the petitioners are correct in their position. The obligation of a union to its members is coextensive with the duties it assumes under the agency authorization of its members. The obligation here is to exclusively represent the members in matters of collective bargaining over wages, hours of employment and conditions of employment. The union did not undertake to represent the members in connection with their rights under the pension agreements. The beneficiary in a pension agreement may under the statute, section 502(a), 29 U.S.C. § 1332(a), independently enforce his ERISA rights without regard to the collective bargaining agreement. Under the specific language of the statute, a union is not a "participating beneficiary or fiduciary" and therefore may not bring an action to enforce a violation of the Act. *Dist. 65 UAW v. Harper & Rowe*, 576 F. Supp. 1468 (S.D.N.Y. 1983); *Alpha v. Pan Am World Airways*, 559 F. Supp. 108, 110 n.3 (E.D.N.Y. 1984). Moreover, the pension participants here are not incumbent but former union members. I therefore conclude that the petitioners may appropriately assert a claim for Payne's legal services.

Spang's argument, however, that any allowance of Payne's services up to July 5, 1991, should be confined to

his salary from USW plus his overhead would limit the petitioners' claim. In *Blum v. Stenson*, 465 U.S 886 (1984), the Supreme Court considered the procedure by which courts should determine the hourly rate of a "reasonable" attorney's fee to be awarded under fee-shifting statutes. The Court concluded that courts should base such an award on the "prevailing market rates in the relevant community"; the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Id.* at 895, 896 n.11. The Court explicitly rejected the argument that publicly funded legal service organizations should receive below-market rates because their overhead was lower than that of private firms. *Id.* at 892-93. It stated that market rates should provide the basis for awards "regardless of whether plaintiff is represented by private or non-profit counsel." *Id.* at 895 (footnote omitted). *See also Miele v. N.Y. State Teamsters Conf. Pension & Retirement Fund*, 831 F.2d 407, 408-09 (2d Cir. 1987) (applying *Blum* analysis to ERISA fee award to non-profit program). Here, however, we have an additional dimension to the mix because USW is not only a non-profit organization but furnishes both legal and non-legal services; the legal phase of its activities runs the risk of violating the American Bar Association's ethical prohibitions against fee splitting and the unauthorized practice of law.

Following *Blum*, courts have allowed award of market-based attorney's fees to union-salaried attorneys who represent successful plaintiffs if certain conditions are met. If the attorney alone is to receive the court award,

"[r]easonableness, in terms of market value of the services rendered, is the sole limit on fee awards to organizationally-hired lawyers." *Nat'l Treasury Employees Union v. United States Dep't of Treasury*, 656 F.2d at 852-853. *Accord Am. Fed'n of Gov't Employees (AFGE) v. FLRA*, 944 F.2d 922, 934 (D.C. Cir. 1991). A conflict with the legal profession's rules of professional ethics arises, however, when the union itself is to receive the award. The fee shifting provisions of ERISA, to be consistent with decisions in other fee shifting statutes, "should be read against the background of ethical considerations regarding receipt of legal fees by nonlawyers." *Curran v. Dep't of Treasury*, 805 F.2d 406, 408 (9th Cir. 1985); *accord AFGE's* 944 F.2d at 934; *Johnson v. Orr*, 739 F. Supp. at 947. For this reason, several courts have declined to award market-based fees when union employed counsel are obligated to turn the award over to the union's general treasury, and instead have awarded the salary-plus-overhead computation suggested by Spang in this case. *See. e.g., Devine*, 805 F.2d 384; *Johnson. Goodrich v. Dep't of Navy*, 739 F.2d 945; 733 F.2d 1578 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *NTEU v. Dep't of Treasury*, 656 F.2d 848. "To grant a market rate fee request is to open the door to fee splitting, unauthorized law practice and organizational profiteering on the professional services of attorneys." *AFGE*, 944 F.2d at 934.

According to the stipulation of the parties, fees realized by Payne for services rendered prior to July 5, 1991, will be paid directly to the union. There does not appear to be any logical reason why a union, represented by an employee attorney should be treated any differently than public interest organizations, legal aid societies and other

private non-profit law offices who are eligible for payment of reasonable market rates, if the awarding court can be assured that fees allowed will not be used in violation of ethical considerations. *See AFGE*, 944 F.2d at 934 (approving market-based fee award where fee placed in union's legal representation fund separate from its general treasury); *Curran*, 805 F.2d at 1408-09 (same). "This assurance puts the organization's legal service project on par with legal aid societies and other private non-profit law offices, and no ethical concern arises." *AFGE*, 944 F.2d at 935. *Accord, Curran*, 805 F.2d at 1409-10. Thus, I recommend that if the USW can in some reasonable manner assure the court that it will place the court award, minus the cost-based fees incurred by the union in supplying legal services to plaintiffs, into a trust fund or a separate union legal representation fund maintained exclusively for legal representation, it should be entitled to a fair market-based attorney fee award.

I turn now to the third issue raised by Spang that the mandamus proceeding involved nothing more than general appellate practice and does not require payment of ERISA expertise prevailing market rates. Spang also objects to any payment for services rendered in the mandamus proceeding because the petitioners did not break out separately the amount of time addressed to the appeal and the time spent on the mandamus.

The substance of Spang's argument already has been addressed in the Master's memorandum opinion of January 31, 1991. In the circumstances of this case, the mandamus proceeding, even if it was a separate action, was a

necessary adjunct to the participants' efforts to implement their ERISA judgment. The participants used mandamus as a vehicle to obtain appellate review of the underlying action. But the appeal and the mandamus, including the reply brief on appeal, were directed to the same objective – the implementation of the court's earlier mandate. The All Writs Act, 28 U.S.C. § 1651, recognizes a federal appellate court's authority to "issue all writs necessary or appropriate in aid of their respective jurisdictions." When the writ is necessary for such purpose, it "is not an independent grant of appellate jurisdiction." Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3932, pp. 184-185. Therefore, there was no need to break out the time between the appeal in *Delgrosso II* and the mandamus, even if the appeal was dismissed. Both proceedings were prudentially taken and necessary to break the impasse in the district court and implement the earlier mandate.

As for Spang's contention that the mandamus proceeding involved nothing more than general appellate practice and no ERISA expertise, this court declared that the mandamus proceeding involved "the allocation of surplus assets from a pension plan maintained under pension agreements between Spang and the United Steel Workers." *Delgrosso II*, 903 F.2d at 235. *Delgrosso II* required a determination whether the respondent had reformed the Spang plan as mandated by the court in *Delgrosso I* and whether other directives established by the Court of Appeals in the initial appeal had been executed. The court is, of course, familiar with the nature and details of the appeal in *Delorosso I* and the mandamus proceeding in *Delgrosso II*, but from a reading of the

opinions in these cases and the record developed before the Master, it seems evident that the petitioners did provide legal ERISA expertise in the appellate court in the mandamus proceeding.

However, the proceedings before the Master are of an altogether different character. These proceedings primarily involve nothing more than ordinary motions, discovery, and evidence in an ordinary attorneys' fee proceeding and required no ERISA or special expertise. In *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897 (3d Cir. 1985), we recognized, as we implicitly did in *Prandini v. National Tea Company*, 585 F.2d 47 (3d Cir. 1978), that compensation should be allowed to attorneys for time spent on fee applications and successful appeals. However, to ensure the award of a reasonable fee we also concluded that fee petition litigation should be treated "as a separate entity subject to lodestar and Hensley reduction analysis". *Id.* at 924, quoted with approval in *Rode v. Dellarciprete*, 892 F.2d 1177, 1192 (3d Cir. 1990). Treating the fee application as a separate entity, it did not require or command ERISA litigation expertise. An analysis of the services rendered discloses that they were not of the character and nature to warrant the same level of compensation as the services in the underlying appellate litigation. The lodestar hourly rate for the fee litigation accordingly should be adjusted.

The fourth objection raised by Spang concerns the hours allegedly expended and the hourly rates claimed by counsel for the petitioners. Spang vigorously urges that both the number of hours and the rates claimed are excessive. The petitioners presented their case largely on documentary evidence, affidavits, and the testimony of

Payne. Spang's evidence consisted primarily of documentary evidence and the testimony of Marsh.

This case was among the very first in which plan participants successfully precluded a plan sponsor from obtaining a reversion of plan surplus. Prior to *Spang I*, courts generally permitted a sponsor to amend its plan to claim a reversion so long as the amendment preceded plan termination. *Washington Baltimore Newspaper Guild v. Washington Star Co.*, 555 F. Supp. 257 (D.D.C. 1983), *aff'd without opinion*, 729 F.2d 863 (D.C. Cir. 1984); *Pollock v. Castrovinci*, 476 F. Supp. 606, 612 (S.D.N.Y. 1979), *aff'd without opinion*, 622 F.2d 575 (2d Cir. 1980); *In Re D. Moyer Trust Fund*, 441 F. Supp. 1128 (E.D. Pa. 1977), *aff'd without opinion*, 582 F.2d 1273 (3d Cir. 1978); *cf., Walsh v. Great Atlantic & Pacific Tea Co., Inc.*, 96 F.R.D. 632, 646 (D.N.J.), *aff'd*, 627 F.2d 956 (3d Cir. 1983). Indeed, this precedent had convinced the district court in this case to grant summary judgment sanctioning Spang's reversion clause. (SA-462-66;[3] *Spang II* Joint App. 1073-77). Thus, the participants worked against a background of discouraging legal precedent. As appellants, their counsel had the difficult burden of convincing the court of appeals to reverse the course set by the district court. Indeed, the burden on them in the mandamus proceeding was even greater. Mandamus is, after all, an extraordinary remedy which issues "only in exceptional circumstances." 903 F.2d at 237.

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[3] "SA" refers to a special appendix submitted by petitioners consisting of 630 pages incorporating copies of opinions, portions of the transcripts of hearings, motions, documents and exhibits in these proceedings.

IV. PRE-FEE APPLICATION HOURS

Petitioners sought compensation for 367.65 hours of service prior to the date they filed the fee application. The hours claimed by each are: Payne 137[4], McIntyre 193.76, Simpson 26.9. (SA-403; Supplement to Application for an award of Attorneys' Fees and Expenses, p.2; Payne letter to Master dated August 22, 1991).

Marsh, general counsel and vice-president of Spang, actively participated in all of the proceedings before the Master and possessed great familiarity with the entire proceedings here and in the court of appeals. Although there was no need for him to record the time he spent, he played a significant role in the appellate proceedings and the proceedings before the Special Master. In fact, he was Spang's surrogate throughout the proceedings. He frequently attended meetings of counsel, deeply involved himself in the defense, entered into the brief-writing process, drafted pleadings and motions, and participated in the hearings and arguments before the Master and the court. He has practiced law for 32 years. (SA-371; T1:107).[5] Obviously, his efforts helped shape Spang's presentation of its case to the court of appeals and the Master. There are no records or trustworthy estimates of

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[4] During the course of the hearings and in response to a Spang objection, Payne reduced his claim to 136 hours.

[5] "T" refers to the transcript of the hearing before the Master. The first digit refers to the day of the hearing. For example, T2: refers to the second day of hearings. The numbers following the colon refer to the pages of that transcript. Petitioners' exhibits commence with number 100 and usually are preceded with the letter "P". Respondent's exhibits are identified by number commencing with "200".

the time he spent on the case, and therefore any figure as to Spang's hours does not reveal the total hours spent on the tasks performed. Spang's total hours are thus understated and necessarily skew any comparison between them and the hours of participants, or petitioners' counsel to their disadvantage.

Comparing total hours spent on the appellate effort from 8/1/89 through 6/30/91, the comparison strongly favors the participants' counsel.

Spang's Outside Firm's Hours – 513.25 (SA-169; P-119, p.l). This excludes any time for Marsh.

Participants' Counsel's Hours – 366.65 (SA-403; Supplement to Application, dated 7/3/90, p.2). This excludes 24 hours for Kearns which were disallowed by the Master in his memorandum opinion of 1/29/91.

Comparing the activities performed by both sides' lawyers, one finds that petitioners' counsel generally applied their time in the underlying proceedings prudently. Based on petitioners' Exh. 152 (SA-303-15), the time spent on the parties' opening briefs, their first mandamus briefs, and services involving oral argument are as follows:

	Spang's 12/1/89 Opening Brief*		Participants' 10/9/89 Opening Brief	
Hours	150.75	(SA-304-06)	68.10	(SA-303-04)
	Spang's 1/10/90 Mandamus Brief*		**Plaintiffs' 10/13/89 Mandamus Brief**	
Hours	78.25	(SA-307-08)	37.25	(SA-304)
	Spang's Oral Argument		**Plaintiffs' Oral Argument**	

	Preparation and Attendance*		Preparation and Attendance	
Hours	68.00	(SA-309)	36.00	(SA-309)
	Total for All Three Activities		Total for All Three Activities	
Hours	297.00	141.35		

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* Includes no time for Marsh.

Thus, viewed as a whole, plaintiffs' pre-application hours for which they seek compensation are reasonable.

The staffing choices here reflect precisely the advantages of experienced counsel. Plaintiffs' counsel devoted slightly more than 68 hours to their opening brief. Conversely, staffing with a mixture of experience levels, Spang devoted 150.75 to preparing its opening brief, not including the services of Marsh. A good deal of that time represented work by the young Jones, Day associate, Iole, whose hourly rate was considerably lower than his senior associate Hurd. (SA-306; P-152, p.4). It would appear, however, that Spang lost much of the advantage of the low hourly rate to Iole's requiring longer time to perform his task. Iole devoted 93.85 hours on his task. *Id.* Moreover, Spang's more experienced counsel had to review intensively his work.

During eight days in November, for instance, Hurd spent the following time in these reviews:

11/22/89	5.50
11/24/89	3.25
11/27/89	2.50
11/29/89	6.75
Total	18.00

(SA-199; P-119, "Hurd Time on Spang in November 1989," p.2). Even this understates the intensity of review required because Hurd's records omit some of the time he spent in reviewing. For instance, Iole records 5.5 hours for meeting with Hurd and Marsh on his brief (SA-196; P-119, 11/30/89 Statement), but Hurd omits a record for the time he spent that day. Moreover, Hurd was not the sole level of review. Attorney Moellenberg devoted an hour on 11/22/89 to reviewing the brief Iole drafted (SA-195, P-119), and another 2.75 hours on 11/29/89. (SA-173; P-119). Besides Hurd and Moellenberg, Marsh actively participated in the review and revision process. (SA-199-200; P-119).

Thus, while Spang used a lower paid, $124-an-hour associate to perform much of its work, the end result was that its effort consumed 150.75 hours, compared to participants' 68.10 hours. (SA-304, 306; P-152, pp.2 and 4). The upshot was that its effort cost Spang $22,084 while the sum plaintiffs' counsel claim is roughly one-third less. In these circumstances, it can hardly be said participants made an unreasonable staffing choice and expended excessive hours in the underlying proceedings. On the contrary, I find that they utilized experienced counsel who performed at efficient levels of productivity during the underlying proceedings.

V. FEE APPLICATION HOURS

As of June 21, 1991, petitioners had recorded 197.85 hours spent subsequent to filing the Application for Fees. This number breaks down as follows: 71.75 for McIntyre (SA-30-31; Jt.Exh. 1, Exh. B – 41 plus 30.75); 96.9 for Payne

(SA-24-28, Jt.Exh. 1, Exh. A); 29.2 for Simpson (SA-35-37; Jt.Exh. 1, Exh. C). At the 7/23/91 hearing, the Special Master established a procedure for hours subsequent to that date. (SA-371H; p.73, lines 15-21). With minor exceptions, these hours represent work in seeking a fee award.

At the hearing before the Special Master on August 29, 1990, the Master stated that he expected the parties to conduct the fee proceedings expeditiously. He made it clear that he did not want the fee proceeding to balloon into another action of full blown litigation. Despite these admonitions, the fee proceedings have regrettably provoked a substantial expenditure of time and money for the parties, the Master, and, in all probability, they will for the court.

A review of the hours for which petitioners seek compensation makes clear that they attempted to observe the Special Master's strictures up to and through both hearings. They made only two discovery requests, seeking but two pieces of information – records of the time Spang's counsel spent on the appellate merit proceedings and records reflecting the time Spang's counsel spent on the fee application. They had to approach Spang a number of times for these materials (SA-281, 281, 283; P-126, p.4, P-127, P-128) and in each instance they had to obtain the Special Master's direction that Spang produce the records. (SA-513-16; 5/22/91 Order for Discovery, p.2; SA-606; 7/29/91 Order).

Petitioners' counsel spent considerable time responding to Spang's motions and activities in the fee proceeding. Thus, at the hearing of August 29, 1990, though the parties had already briefed the issues, Spang sought an

opportunity to present essentially a motion for summary judgment asserting that the law precluded granting all or portions of the fee request. Spang filed a "Brief on the Issue Whether Petitioners' Counsel Are at all Entitled to Seek an Award of Attorneys' Fee and Expenses" on September 28, 1990. Participants responded. See 11/21/91 reply.

Further complicating the fee proceedings, Spang strove to use them as a means to relitigate the merits. In this respect, at the 8/29/90 hearing, Spang sought to interject the issue of Ms. Grant's refusal to assume her administratorship. Spang claimed that petitioners were culpable for this development, although it had unsuccessfully made this same contention in opposing the petition for the writ of mandamus. (SA-517-27). At the hearing, the Special Master made clear that there was to be no discovery concerning Ms. Grant absent his directive. Nonetheless, Spang sought discovery concerning Ms. Grant without seeking any prior approval from the Special Master. (SA-271-73; P-123, pp.10-12). Noting that material concerning Ms. Grant was irrelevant to the fee request, petitioners refused to provide it. They did so orally in their 2/19/91 conference with Spang's counsel and in their letter of 3/4/91. (SA-281; P-126, p.4).

More than two months later, on May 8, 1991, Spang's counsel sought to compel production of evidence relating to Ms. Grant. (SA-528-33; Spang's 5/8/91 Motion to Compel, pp.2-6). Again, petitioners opposed the motion, noting that the court of appeals had already rejected Spang's contentions. (SA-517-27; Petitioners' 5/20/91 response to respondents' 5/8/91 motion to compel, pp.4-12). The Special Master denied this request. (SA515; 5/22/91

order for discovery, p.3). Thereafter, Spang sought reconsideration of this ruling. (SA-534-539; Respondents' 6/3/91 response to order to show cause and motion for reconsideration and other relief, pp. 12-16). The Special Master denied Spang's motion for reconsideration, concluding:

> Discovery is only appropriate of matter which is relevant to the pending proceeding. Fed. R. Civ. P. 26(b[sic](l). Delgrosso's communications with Ms. Grant may have related to the petition for mandamus, but, once granted, they are no longer relevant to the issue of counsels' entitlement to fees for its prosecution of *Delgrosso II*. Thus, it does not appear that Spang's request is relevant to this proceeding and the Motion for Reconsideration should be denied.

(SA-540-41; 6/11/91 Memorandum and Order on Respondent's Motion for Reconsideration, p.4).

Again, a comparison of the hours devoted in these proceedings by counsel for appellants and Spang is made more difficult because Marsh maintained no time records. Marsh's participation in the fee proceedings also was substantial. He is the one Spang attorney who attended each of the hearings before the Special Master beginning with the 8/29/90 hearing. At the hearings on 7/23/91 and 8/5/91, it was clear that he had assumed primary responsibility for analyzing and identifying challenges to the petitioners' hours. He was primarily responsible for conducting a survey of fees to support Spang's view as to what is reasonable. Marsh authored and submitted Spang's pre-hearing brief setting forth its view as to the controlling legal principles, (SA-604-05; Respondent's

Memorandum of Applicable Law re Application for Award of Attorneys, Fees, p.13), and submitted the 8/12/91 letter criticizing participants' Exhibit 152. (SA-474-75).

The records Spang produced show substantial involvement by Marsh. The time listing of Hurd's new firm, The Benefits Department, exemplifies the extent of the involvement. The listing contains entries for eighteen dates from February, 1991 to July, 1991. Thirteen of those entries show Marsh's involvement. (SA-245-46; P-120). On December 7, 1990, Spang filed its final brief on the question whether petitioners were entitled to fees. The Jones, Day records reflect Marsh's participation on December 4, 5, 6, and 7 in that briefing. (SA-241-42, P-120, Entries for 12/4-7/90).

Comparing one specific item, the initial briefing, the petitioners' efforts compare favorably with Spang's. This includes petitioners' initial application (even though it includes much necessary material beyond what strictly is a brief), their response to Spang's objections, and their response to what was in effect a motion by Spang to deny fees. In all these activities, petitioners' expended a total of 106.7 hours, though theirs was the heavier burden. (SA-316, P-152, p.13). In contrast, the Jones, Day firm recorded 161.25 hours in objecting to the petition and in briefing its motion to deny fees, and those hours do not include Marsh's efforts.

Furthermore, I can perceive no evidence that petitioners sought to burden the proceedings with unnecessary counsel. Two lawyers represented Spang at each hearing – Marsh and Iole at the 8/29/90 pre-hearing

conference and Marsh and Lucas at the 7/23/91 and 8/5/91 hearings. One lawyer appeared for petitioners at the first two hearings, even though they had the burden. Payne, who had the greatest familiarity with petitioners' documentary evidence, joined McIntyre at the 8/5/91 hearing, but only after Spang had complained at the 7/23/91 hearing that McIntyre, appearing alone, had "floundered through the documents," (SA-371Q; 7/23/91 Tr. p.93), and after Marsh's testimony attacked Payne's time records.

A. McIntyre's Claim for Hours

McIntyre claims, and Spang acknowledges (Spang's Requested Finding of Fact (FOF) 32(D)) that the hours submitted by him (P-Exh. 152) through 6/30/90 were reasonably expended on either the appeal, No. 89-3573, the mandamus action, No. 89-3677, or the fee petition ancillary to the mandamus action, and I so find. The hours were:

	Appeal	Mandamus	Mandamus Fee Petition	Total
Submitted (Jt.Exh. 1)	119.75	72.00	2.00	193.75

McIntyre's hours claimed in the ancillary fee proceedings from 7/1/90 through 6/30/91 were 71.75 hours (Jt. Exh. 1) to which Spang takes exception. Spang claims that 49.75 hours of that time were not reasonably expended (see Requested Finding of Fact (FOF) 32E, p.16), and consistent with its position throughout these

proceedings, objects to any allowance of fees for time spent on the appeal. (T-1:83).

With respect to McIntyre's petition, Spang specifically objects to 3.75 hours as unnecessary time spent in preparing a response to the answer to the fee petition. (SA-371). I agree and sustain this objection. I also sustain Spang's objection to 3.75 hours claimed by McIntyre for services in response to respondent's objections in July of 1990 as redundant and of questionable value. I reject Spang's objection, however, to McIntyre's 5 hours travel time to attend the 8/29/90 conference convened by the Master in this proceeding (T-1:86). This time was reasonable and necessary. Spang also objects to 23 hours claimed by McIntyre in November 1990 for the preparation of a brief on the issue whether attorneys' fees can be awarded at all in a mandamus proceeding. Payne also claims 25 hours for his role in the preparation of the brief, or an aggregate of 48 hours. Spang's objection not only is directed to excessive hours spent, but also to any award because the filing of the petition impliedly represented to the court that counsel had "already researched the law." (T-1:87).

I dismiss the objection to an allowance of fees because briefing should have preceded the motion. Although such a practice is highly commendable, the reality is that the common practice when a brief is requested or deemed desirable is to file it after or with the motion. However, 48 hours of time expended on this brief by seasoned lawyers appears to me to be unduly high. I reduce their claimed hours by 6 hours each to a total of 36 hours.

Spang also objects to 10.5 hours charged by McIntyre in resisting discovery. Much, if not all of this discovery, related to Spang's effort to again interject the issue of Ms. Grant's refusal to assume her administratorship. Spang had previously and unsuccessfully made this same contention in opposing the petition for the writ of mandamus. (SA-517-27; Petitioners' 5/20/91 Response to Motion to Compel Discovery). The Master previously had ruled that there was to be no discovery concerning Ms. Grant absent his direction, which he never gave. This material concerning Ms. Grant was irrelevant to the fee proceeding. I therefore dismiss this objection.

Spang makes more extensive and more numerous objections to Payne's charges for alleged services rendered. Preliminarily, because the accuracy of some of these charges are questioned, there is evidence, which is not seriously impugned, that the petitioners' counsel recorded their hours contemporaneously with the performance of the services described in their time entries. (SA-22-37; Jt. Exh. 1). Spang declined its opportunity to cross-examine concerning the contemporaneity of the recording. (SA371A; T-1:15, lines 20-21). In this period, prior to 6/30/90, Spang limits it [sic] objections to time spent by Payne, Fox, and Simpson.

B. Payne's Claim for Hours

Payne submitted a claim for 58.8 hours of services in connection with the appeal, 48.9 hours applied to the mandamus, and 126.2 hours for services rendered on the fee petition up to June 30, 1991. (Jt. Exh. 1). Spang objects to 108.35 of the hours, principally time spent on the fee

application to 6/30/91 (Jt. Exh. 1). The specific objections are as follows:

8/21/89 5 hours which Spang claims was not provided with respect to these appellate proceedings because the appeal had not yet been taken. (T-1:96; Ex. A. to Jt. Exh. 1, entries for 8/21-25/89). However, Payne's contemporaneously recorded time entries provide that evidence and he explained that the services were performed in preparation of the appeal papers. Payne testified that it was necessary to research the appealability of the district court's order closing the case. (T-2:110). The order was itself an unusual one, which "raises the question whether the order effectively, if not expressly, brings the case to a close." (SA-8; 903 F.2d at 236). In these circumstances, it was both reasonable and prudent for Payne to devote some care in researching and preparing the initial appeal papers and the five hours is not an unreasonable expenditure of time.

12/7/89 3 hours pertaining to a different case (T1:97-98). Payne's explanation is that except for .25 relating to another matter, the time was spent in drafting the issues for the appeal, putting together some materials for the appendix, and some research (T-2:109-10) pertaining to the underlying proceedings in this dispute. Payne's explanation is credible, but he consents to a reduction of 1 hour, an adjustment which I have already made in this report. *See* p. 22, n.4.

12/89 Charge of 18 hours because it related to the appeal dismissed and not the mandamus proceedings. As stated in my memorandum

opinion, I conclude that both proceedings have a common nucleus in fact and law and are intertwined. Thus, this time is allowed and is reasonable.

2/6/90 7 hours spent to travel and attend the oral argument. Spang objects that Payne's presence was unnecessary and duplicative. In appellate proceedings of this importance and complexity, it is quite common and necessary for associate counsel to assist a colleague in the oral argument with references, information, and ideas, especially when the associate has played an important role in the preparation of the briefs and oral argument. Both Hurd and Marsh attended the argument in behalf of Spang. Payne's attendance and time were not unreasonable and the charge is allowed.

2/9/90, 5/22/90, 5/25/90

Items aggregating 3.75 hours allegedly excessive as compared with exhibits of Kathryn Simpson and McIntyre (T1:104). It may well be that Simpson and McIntyre neglected or chose not to make these entries but I find it difficult to believe that Payne would have entered these insignificant items falsely or erroneously. They are allowed.

5/91 4.5 hours spent answering a Rule issued by the Master to show cause why sanctions should not be applied to the parties and 3 hours travel time in June 1991. Both charges were appropriate and reasonable. .5 hours to respond to Spang's bill of costs is not improper or unreasonable. It is allowed.

Spang asserts that Payne's statement of hours spent in the underlying proceedings include 34 hours which are

really attributable to the fee petition. An examination of Jt. Exh. 1, Exh. A, 3, shows that Spang is correct. Marsh, testifying in behalf of Spang, also asserts that charging 31.5 hours for the preparation of the fee petition is excessive and that one-third of it should be eliminated. (T-1:107). He testified that the fee petition included matters that were denied by the Master in the January 1991 memorandum opinion, that Payne charged 19.5 hours attributable to the preparation of a response to Respondents' objections which he opined was "totally unnecessary" (T1:108), and that 3.2 hours charged on July 10, 11, and 16, 1990, were attributable to the appeal, had nothing to do with the fee application and were inappropriate. Marsh also reiterated the objection that he had made with respect to McIntyre in charging 48 hours for briefs in the mandamus proceedings, (T1:109) as to which I have stated there will be a reduction of six hours each. Finally, Marsh asserts that 9.7 hours in May and June 1991 for resisting discovery also should be deducted.

Petitioners filed a well-prepared and documented application for an award of attorneys' fees and expenses for services in *Delgrosso I* and *Delgrosso II*. It consists of thirteen typewritten pages plus exhibits. The exhibits consist of photocopies of the reported court's opinions in *Delgrosso I* and *Delgrosso II*, affidavits and resume for each applicant counsel, and copies of record entries for fees and expenses, several affidavits of other practicing lawyers with respect to prevailing market rates for fees of lawyers with comparable skills, and a copy of the submission by Reed, Shaw & McClay to the IRS on October 23, 1980, for the determination of the collectively-bargained

plan for Spang, a lengthy appendage which I find unnecessary for these fee proceedings.

Except for the first thirteen pages of the application, the rest of it consists of exhibits readily available from counsels' files. It also contains references to *Delgrosso I*, although these have not added materially to the preparation of the application. Payne claims 31.5 hours at a rate of $220 per hour, or $6820, for merely preparing this petition. I do not question that Payne may have applied all of this time to the application, but I find the time applied for this purpose, much of which was ministerial and could have been done by a paralegal or secretary, to be unreasonably expended by a lawyer of Payne's talents and experience. I therefore find that a fair and reasonable allowance for the preparation of the fee application is 24.5 hours and this item is reduced by 7 hours.

As for the 19.5 hours (July 1990) attributed to Payne for the response to respondents' objections, much of the material in that response, as in the case of McIntyre in this matter, *see supra* p. 31, is redundant, having been set forth in prior briefs to the court in the underlying proceedings. The response is of questionable value and was neither solicited nor authorized by the court and I find that the charges for it are unreasonable. They are disallowed.

As to the 3.2 hours charged on July 10, 11, and 16, which Marsh claims were attributable to the appeal, Marsh may be correct. However, the application for fees was filed 7/2/90. Because the entries are not altogether self-supporting and the burden of proof is on the applicant, I find that these charges should be allocated to the

Delgrosso II appeal proceedings. Of course, if the court should decide not to allow any fees for the appeal in *Delgrosso II*, this charge will not be paid. If, however, the appeal and mandamus proceedings are intermeshed, as I believe they are, these services will, in the Master's view of the fees to be charged, command a higher rate than if they were allocated to the fee petition.

With respect to the 9.7 hours spent in resisting discovery, this pertained to the effort of Spang to compel petitioners to produce communications with the appointed Plan Administrator, Dale Grant. These materials were irrelevant in this proceeding and petitioners appropriately resisted it. I find the time charged is reasonable and appropriate.

In summary, McIntyre claims 191.75 hours for services performed on the appeal of *Delgrosso II* and the mandamus petition through June 30, 1991, and 2 hours on the fee petition, which I have found reasonable (see Report supra). For the fee petition period from 7/1/90 through 6/30/91, McIntyre claimed 71.75 hours which I find should be reduced by 13.50 hours. He is, therefore, allowed 60.25 hours for this period.

Payne claims an aggregate of 136 hours for services rendered in the appeal and mandamus. Of this sum, 1 hour is reduced by consent and 34 hours is reallocated to the fee petition. In response to Spang's objection (p.36, supra), 3.2 hours charged to the fee petition is reallocated to the appeal and mandamus. I find, therefore, that Payne reasonably expended 70.9 hours on the underlying proceedings and 130.5 hours on the fee petition proceedings from 7/1/90 through 6/30/91.

C. Kathryn Simpson

Spang objects to any allowance of fees to Simpson, claiming that her services were unnecessary and duplicative. However, Payne testified that she was engaged, not because she performed services that McIntyre and Payne could not do competently, but to assist because of their heavy caseload. (T2:143,144). I am convinced that her services were not duplicative and that they relieved McIntyre and Payne of considerable ministerial and administrative functions. Her services not only assisted petitioners' lead counsel, but they also financially benefitted Spang because her hourly rate for services is less than McIntyre's and Payne's. Simpson performed services on both the appeal, mandamus and fee petition. She claims 26.9 hours from 8/89 to 6/30/90 and 24.4 hours from 7/1/90 to 6/30/91 for a total of 51.30 hours. I find that the hours claimed were reasonably expended and they are allowed.

D. Michael D. Fox

Michael D. Fox performed ten hours of service, which is undisputed, while a full time employee of the USW and this sum is allowed. Spang contends that any award to Fox, as it has contended with respect to Payne, should be based on his union salary plus overhead; that USW, by providing counsel to the petitioners throughout the underlying proceedings, has been performing its legal duty to represent its members. This argument has been rejected as to Payne and I do so with respect to Fox.

E. The Hourly Rate

In addition to Spang's vigorous objection to the lodestar hourly rate claimed by McIntyre and Payne, it also raises a separate objection to any fee award to them for time spent after June 30, 1991. I turn to this objection first. Spang maintains that in an effort to obviate the hearing contemplated by the Master, on 5/30/91, it dispatched a letter to petitioners offering to stipulate to 273.25 hours as having been reasonably expended by McIntyre and Payne, without regard to the hours spent on the fee application itself. That letter also proposed to stipulate as to hourly rates. By letter dated 6/19/91, addressed to McIntyre, Spang offered to stipulate to a specific sum to be awarded by the Master for attorneys' fees attributable to the fee petition and underlying proceedings through 6/30/91, leaving the petitioners free to seek an interest or delay factor and a contingency multiplier (D.Exh. 207). Spang, however, would be free to pursue its defenses. Acceptance of Spang's proposal, it contends, "would have obviated the need to conduct a hearing" and would have saved court time and expenses and simplified these proceedings. Because petitioners rejected the offer (T1:140), Spang has requested the Master to find that the hours were not reasonably expended for the petitioners beyond 6/30/91 unless such hours specifically are segregated and identified as related to the request for a delay factor or providing the Master with authority for a fee award in a mandamus proceeding.

Spang's offer to stipulate fees, however, was conditional. It did not propose to suffer a judgment in an amount certain. The stipulation was merely a stepping-block to further appellate proceedings in which Spang

expected to challenge all liability for fees, a position Spang has consistently maintained throughout these fee proceedings. Furthermore, petitioners rejected the amount proposed in the stipulation as too low. They also note that the proposed sum, besides not ending the litigation, was less than half the amount Spang itself had expended for its counsel on the appellate and fee petition proceedings. In these circumstances, I conclude that the petitioners' counsel are not precluded from asserting a claim for services performed after 6/30/91.

Petitioners' counsel in these proceedings have acted under "Authorizations for Legal Representation" signed by petitioners at or about the time they initially commenced the *Delgrosso* suit. They state in part:

> I hereby authorize Daniel P. McIntyre and attorneys with whom he is associated, who are employed by the United Steelworkers of America, AFL-CIO-CLC, (the International Union), to represent me in connection with my claims arising under Section 502 of the Employees' Retirement Income Security Act and Section 301 of the Labor Management Relations Act against Spang & Company. I understand that such attorneys will charge no fees and that they will return instead for their fees upon any award a court may grant.

The hourly rate to be awarded has been the subject of considerable briefing, controversy, discovery, and evidence. McIntyre and Payne claim a $240 and a $220 lodestar hourly rate respectively for services commencing September 27, 1984 with *Delgrosso I*. A claim also has been made for $26,890.50 for services of Joy Klopp Delaney in *Delgrosso I* at an hourly rate of $195. Claims

for services in *Delgrosso II* also have been made for Attorney John J. Kearns III at $240 per hour for a total of $5,760 and by Attorneys Simpson and Fox at $220 per hour.

In accordance with my memorandum opinion of 1/31/92, services performed in *Delgrosso I* have been denied. Also in accordance with that memorandum, Kearns' claim for $5,760 has been rejected. For the same reason, the claims of Joy Klopp Delaney is denied.

As for Fox, I find that his services consisted of legal research in connection with the appeal and mandamus proceeding. Most services were performed at the office of USW, with its consent, and within the scope of his employment. No evidence has been submitted as to the amount of his salary or other compensation or allowable overhead at the time and with respect to the services in question. (Jt. Exh. 1, para. 5). Any attorney's fee award made in this proceeding to him will be paid directly to the USW unless the court directs the USW to create a support fund to hold the award for legal expenses (Exh. 1, par. 6). Fox graduated from the University of Wisconsin Law School cum laude in 1979, Order of the Coif and was an editor of its law review. Prior to his employment by USW, he had been staff counsel for almost 8 years with Honorable Howard Jenkins of the National Labor Relations Board.

By comparison, Simpson, received her B.S. from Pennsylvania State University in 1969, and her 1975 M.B.A. and 1978 J.D. from the University of Pittsburgh. She serves as vice-chairperson of a Bench Bar Conference and has taught trial advocacy. (SA-438; Fee Application, Exh. G to Payne Affidavit). As a partner in a private legal

firm, Simpson realized $80 to $150 per hour for her firm during the applicable period, with approximately 30% of her cases billing hourly rates in the $80-$100 range. Approximately, 55% of her cases during that time realized billing rates in the $110-$130 range and 15% of her cases at approximately $150 per hour. (Jt. Exh. 1, ¶ 3). Considering the nature of his services, his experience and comparable rates, I find that a reasonable hour rate for Fox is $125 per hour for a total of $1,250.

As for Simpson's hourly rate, the nature of her services required no special expertise. As already mentioned above, 85% of her cases realized billing rates in the $80-$130 range. USW compensated Simpson for her services at a rate of $90 per hour. (Jt. Exh. 1, paras. 1,4). She claims an hourly rate of $220 throughout her entire billing period. Because of the nature of her duties in the proceedings, I do not distinguish between the underlying proceedings and the fee petition proceedings in determining a fair rate of compensation for her. Simpson's historic rate is clearly lower than the rate participants seek for her. It is also lower than the rate William Payne understood to be her rate when he filed the Fee Application that sought compensation for her. In 1990, she was the most junior partner of the ten member law firm of Grogan, Graffam, McGinley & Lucchino in Pittsburgh. Simpson practiced law in the Allegheny County District Attorney's Office prior to 1985 and that practice did not include any pension-related or ERISA work. Approximately 10 percent of her practice since 1985 has involved pension, employee benefit-related or ERISA litigation. (Jt. Exh. 1, ¶ 1).

If Simpson is to be awarded any compensation at all, Spang proposes an hourly rate of $100. In light of an award to Fox of $125 per hour, which Spang regards as a reasonable rate for him, I find a rate of $100 per hour to be too low. Attorney David Fawcett, a distinguished and highly regarded litigator in Pittsburgh, and professionally well known to the Master and a former President of the Allegheny County Bar and the Pennsylvania Bar Association, testified in a recent proceeding in the Allegheny County Court that competent legal associates of the 1985 law school graduating class employed by his firm, Dickie, McCamey & Chilcate were being paid $110 and were billing at the rate of $110 per hour.

Although the nature of the services performed in this case by Simpson were largely administrative and ministerial, they required greater responsibility and justifies as high a rate. Moreover, John Iole, who appeared for Spang in the early phase of these fee proceedings, billed at a rate of $124-$128 per hour. (T1:49; p.121). I find that $125 per hour is a reasonable rate for her services throughout the entire proceeding.

The major fee claim, of course, is on behalf of McIntyre and Payne. Spang not only objects vigorously to any award to Payne as duplicative, but that if an award is to be made, the lodestar rate claimed is excessive. McIntyre and Payne are experienced ERISA litigators. They have appeared in a considerable amount of ERISA litigation, some of which has been referred to in this report, and several of which are stated in Jt. Exh. 1, ¶ 10. *See e.g. Deeming v. American Standard, Inc.*, 905 F.2d 1124 (7th Cir. 1990); *Keffer v. Connors Steel Co.* (S.D.W.Va.); *USW v. H.K. Porter: Bower v. Bramber Hill Co.*, 725 F.2d 1221 (9th Cir.

1984); *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984).

McIntyre graduated cum laude from Yale in 1971 and graduated first in his 1976 class from the University of Maine School of Law where he was on the Board of Editors of the Law Review (SA-434; Fee Application, Exh. C to Payne Aff.). In an affidavit submitted by Roslyn Litman, a distinguished trial lawyer of the Pittsburgh bar and a permanent delegate to the Circuit's Judicial conference, she opined "without reservation that in the field of employee benefit litigation Mr. McIntyre's ability as a lawyer is unexcelled." (P-103, pp.5-6). McIntyre was a full-time salaried employee of the USW, employed in Pittsburgh, Pennsylvania from 1976 to 1984 as assistant general counsel. Since 1986, he has been a sole practitioner with offices in Falmouth, Maine.

Payne, a 1975 summa cum laude graduate of the University of Pittsburgh and a 1979 graduate of Boalt Hall School of Law (U.C. Berkeley), has served as co-chairman of an ABA employee benefits subcommittee, and he lectures and writes on ERISA issues. (SA-436-37; Application for Fees Exh. F. to Payne affidavit). He was a full-time salaried employee of USW from July 1982 to July 5, 1991, serving as assistant general counsel. Since July 5, 1991, he has been an associate of a Los Angeles, California law firm. Most of his services were performed at the offices of the USW in Pittsburgh. Services prior to July 5, 1991, were performed with the consent of the USW and within the scope of Payne's employment with the USW.

Payne has handled a number of cases which have developed the law of ERISA, and, had he the time and the

petitioners the inclination, he was competent to have adequately represented the petitioners in these appeal and mandamus proceedings. (T-2:147-48). Hurd, who at one time also represented Spang in these proceedings, recognized Payne as one of "a select group of practitioners" whose advise was sought in organizing a conference on employee benefits litigation (SA-159-161; P-117). Petitioners did not submit any evidence as to the amount of Payne's salary or other compensation or allocable overhead with respect to the services prior to July 5, 1991.

McIntyre and Payne claim lodestar hourly rates of $240 and $220 respectively in all of the proceedings commencing with *Delgrosso I* and concluding with this fee petition. In addition, they seek enhancement for delay in lieu of interest and a multiplier because of the quality of the work and their contingency fee arrangements. Spang strenuously objects to these rates on several grounds. First, that in the past, McIntyre and Payne have sought fees at considerably less per hour, and independently of the hourly rate sought, have been awarded fees at a much lower hourly rate. For example, in *USW v. H.K. Porter,* the trial court characterized an award of $160 as "reasonable for a lawyer of Mr. Payne's experience and expertise" and denied a request for a multiplier or other enhancement (Jt. Exh.1, ¶ 10,ii).

Spang specifically cites to the fee proceedings referred to in petitioners' Exhibit 1 arising in a wide range of jurisdictions where the attorneys' fees awards to McIntyre and Payne ranged from $130 to $165 per hour, a multiplier or other enhancement was denied in one of the cases and none was sought or awarded in the other cases. However, except for *USW v. Potter,* none of those cases

were in the Third Circuit. As previously noted, the parties stipulated that the Master should apply the prevailing market rate in the Third Circuit.

Spang asserts that the evidence submitted demonstrates that many of the most prominent litigation attorneys in Pittsburgh with approximately 30 years or more experience bill their corporate clients at hourly rates not exceeding $200. Spang notes that attorneys currently representing it, including Hurd, an acknowledged ERISA expert, have billed Spang at their normal or standard hourly rate of $160-$170 per hour. Spang further asserts that experienced ERISA attorneys in the Pittsburgh area having approximately 15-20 years experience generally bill in the $160-$170 per hour range, and that "the current prevailing partners' rates on bids in the Pittsburgh area for multi-employer ERISA work is in the $105-135 per hour range." (T-1:122-29; D.Exh. 204,205,206,218).

In response to Spang's argument that the hourly rates for McIntyre and Payne should be limited to those they have received in other ERISA cases, petitioners note that each of the awards on which Spang relies were in jurisdictions outside the Third Circuit. Moreover, most of these awards were for services provided long before the 1989-91 time frame at issue here, when market rates were higher and the lawyers were less experienced. Finally, they argue Spang characterizes as awards what really amount to settlements and settlements characteristically are not reliable indicators of market rates.

Marsh testified that he was familiar with market rates for attorneys' fees in the Western Pennsylvania area and Pittsburgh, that he has made a survey, and that the

maximum rate for senior attorneys and litigators with thirty years experience in private practice is $200 per hour (T1:123). He referred specifically to well known lawyers, including Paul Manion, a senior named partner in the firm of Manion, McDonough & Lucas which is currently representing Spang. Manion's maximum hourly rate in 1989-90, Marsh asserted, was $200 per hour. Petitioners, however, claim that Marsh's survey suffers from a critical omission because it fails to include rates paid by Spang itself to Reed, Smith, Shaw & McCloy which represented it in employee benefits litigation and initially in the appellate proceedings here. These rates paid senior partners ranged from $230 to $250 per hour. Spang paid Attorney Hurd, who played an active role in the early stages of the litigation, $225-$230 per hour (Exh. P-121). Spang received no discount from Jones, Day, Hurd's firm, and was not charged a premium. (*Id.*)

Spang suggests as fair and reasonable an hourly rate of $165 for lead counsel McIntyre, and if an hourly rate is to be awarded to Payne and Fox, $125 per hour each. In this respect, Spang states that Payne assembled the briefs, the appendix, the fee application, the petition for mandamus, and the motions, all which could have been delegated to a paralegal. However, Payne, like McIntyre, is experienced and adept in complex litigation involving employee benefits and ERISA.

Petitioners produced a considerable amount of documentary and affidavit evidence disputing Spang's position. Michael Malakoff, a member of the Pittsburgh firm of Berger, Roperton, Malakoff & Meyers, and a member of our Third Circuit Task Force on Court Awarded Attorney's Fees, is a 1974 law school graduate (Exh. P-110). A

verified petition filed in *Glenderman v. Joy Technologies. Inc.* (Exh. P-110) noted that the customary rates for Malakoff's service when paid on a non-contingent basis is $250 per hour. (Exh. P-110, p.14). Similarly, John J. Kearns III, a 1976 law school graduate and a member of a prominent Pittsburgh law firm, Echart, Seamans, Cherin & Mellott, who specializes in the employee benefits area charges $240 per hour and avers that this is the normal and customary rate he charges for the type of service rendered in this case (Exh. P-110). Also in evidence is information from a survey or rates of firms in the Third Circuit published on June 3, 1991, by *Of Counsel* (A Prentice/Hall publication). According to the survey, each of the three Pittsburgh firms surveyed had rates ranging from $165 per hour for "low partner" to $300 per hour for "high partner." Of the 26 Third Circuit firms reported in that survey, the range for rates ranged from $85 to $90 per hour for "low partner" in some Philadelphia firms to a high for one Philadelphia firm of $350 per hour (P-109). I do not find the *Of Counsel* survey helpful in this proceeding. It. provides no insight for the criteria used in the billing by the lawyers making the billing, and the nature of the legal services rendered.

Unlike the negotiation of fees between an attorney and client, the determination by a judge of a fair and reasonable rate of compensation for an attorney's services is an imprecise task. The determination of a legal standard is difficult and often amorphous. In *Student Public Int. Res. Group v. AT&T Bell. Lab. (SPIRG)*, 842 F.2d 1436, 1438 (3rd Cir. 1988), the court concluded "that the method for calculating fees for this unique genre of attorneys, who operate for profit but essentially rely on fee shifting

statutes, must depend on local rates for similar work." In looking to the local rates for similar work, we have stated that a reasonable attorney's fee is "one that compensates a lawyer for the fair market value of his time, experience and effort." *Hall v. Borough of Roselle*, 747 F.2d 838, 841 (3rd Cir. 1984), quoted with approval in *SPIRG*, 842 F.2d at 1442.

The system under which McIntyre operated after he left his employment with USW in 1984 used no billing rate; it depended upon court awarded fees or agreements. Payne had no historical billing rate for almost all of the time period involved because he was an employee of USW. I believe that the settlement rates of McIntyre and Payne in prior cases referred to in Jt. Exh. 1 are not a fair indicator because they are remote in time and not in the relevant market area.

SPIRG adopted a community market rate because it believed that such a rule represented the best compromise among the conflicting fee shifting statutes and is the simplest and most workable rate. 842 F.2d at 1448. This rule requires the courts to assess the experience and skill of the attorneys requesting the fees and determine whether the requested rates "are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skills, experience and reputation." *Blum v. Stanson*, 465 U.S. 886, 896 n.11 (1983).

Assessing the experience and skill of McIntyre, the nature of the services rendered on appeal, and the market in which these services were performed, I find that a reasonable hourly rate in the underlying proceedings for McIntyre is $225 per hour. This was the rate charged by

Hurd, a senior partner of Jones, Day in the underlying proceedings (P-121). Their experience, training and skills are reasonably comparable. Although it exceeds the contractual rates of Roslyn M. Litman, who in 1991 agreed to represent the Pittsburgh Parking Authority at $195 per hour in securities litigation, that was a special situation involving different services and conditions of employment.

As for Payne, he was not lead counsel for the appellants and he did not present the oral arguments. Although he may be competent and familiar with ERISA law, it was evident to the Master that he does not have the forensic skill and experience of McIntyre. His duties related primarily to the preparation for hearings, the pleadings, and briefs and he did not carry the same responsibility for the case as did McIntyre. Although petitioners suggest a difference of $20 in their hourly rate, I believe the difference should be slightly more. I find that a fair and reasonable rate for his services in the underlying proceedings is $190 per hour.

With respect to the fee proceedings, these did not require any special expertise in any area of the law, particularly ERISA or employee benefits law. Although briefing was required on several issues of law in the preliminary stages of the proceedings, the rest of the proceedings were unremarkable except for the bitterness of the contest which contributed considerably to its protraction. Whatever services were required of counsel for the petitioners, they were performed painstakingly, competently, and thoroughly. Nonetheless, I find that a reasonable hourly rate for these services should be substantially less than for the underlying proceedings. As

we observed in *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 924 (3d Cir. 1985), "[w]e believe that the fee reduction rationale of *Hensley*, because it is intended to ensure the award of a reasonable fee in light of the results obtained, applies . . . to fees generated in the litigation of a fee petition, and compels us to treat *the fee petition litigation as a separate entity subject to lodestar . . . analysis.*" (Emphasis added).

I therefore find that a reasonable hourly rate fee for services rendered throughout the fee application proceedings is $170 per hour for McIntyre and $150 per hour for Payne. The rate for McIntyre is comparable to the hourly rate billed Spang by Kevin Lucas of Manion, McDonough & Lucas, a very competent and experienced trial lawyer for similar services during the same time frame. It is $45 per hour more than that allowed Simpson and Fox and compares favorably with hourly rates realized by practitioners in the market for similar services. As for Payne, the hourly rate allowed him maintains the suggested differential by the petitioners of $20 per hour and for reasons mentioned above is otherwise reasonable and in line with the market rate for the type of services provided in this phase of the proceeding.

I find no reason for any reduction of fees because of any alleged lack of success by petitioners' counsel as to particular motions or legal issues. As litigation proceeds in a case, it can be expected that not every step in the proceedings will receive unanimous approbation. A reasonable amount of backhoeing is not exceptional. Nor should the court be expected to calibrate every detail of the professional representation in finding a reasonable fee. In *SPIRIG*, [sic] the court observed that:

> The Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S.Ct. 1933, 1940, 76 L.Ed.2d 40 (1983), held that "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee," and that "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *See City of Riverside v. Rivera*, 477 U.S. 561, 106 S.Ct. 2686, 2692, 91 L.Ed.2d 466 (1986) (quoting *Hensley*); *Cooper v. Dyke*, 814 F.2d 941, 950 (4th Cir. 1987) ("[f]ull compensation for hours expended does not require plaintiff to prevail on every claim . . . [W]here all claims are closely related because based on common facts or related legal theories, a court is not obligated to determine which hours were spent on which claims"). 842 F.2d at 1455.

In summary, I find that the following hours expended by petitioners' counsel in the underlying proceedings and in the fee application to June 30, 1991, to be fair and reasonable:

	Underlying Proceedings	Hourly Rate	Award
McIntyre	191.75 hours	$225.00	$43,143.75
Payne	70.90 hours	190.00	13,471.00
Fox	10.00 hours	125.00	1,250.00
Simpson	26.90 hours	125.00	3,362.50
		TOTAL	$61,227.25

	Fee Proceedings to June 30, 1991	Hourly Rate	Award
McIntyre	60.25 hours	$170.00	$10,242.25
Payne	130.50 hours	150.00	19,575.00
Simpson	24.40 hours	125.00	3,050.00
		TOTAL	$32,867.25

F. The Updated Claim through August 21, 1991

By letter dated 8/22/91, petitioners' counsel have submitted an updated claim of hours and expenses for June, July, and August 1991 through and including August 21, 1991. In this update of hours, the names and charges of two additional counsel and four additional law clerks surface. In addition, charges for a paralegal, Robert Rodriguez, is made for $6,142.50. Additional expenses of $2,580.90 are requested. (Appendix H to letter).

(1) Fees

I find that the total time spent by petitioners' counsel, their assistants, and clerks in preparation for the fee hearings which were of limited dimension to be extravagant. Much of the documentary evidence, although interesting and educational, was unnecessary. The Requests for Findings of Fact were completely out of proportion to the limited transcript and exhibits, and too much time was spent in preparation for the hearings. I do not believe that Spang should be burdened with this unnecessary cost. I have therefore disallowed the hourly charges billed on Appendix "C" and Appendix "D" by 33-1/3%.

Counsel in an effort to recover fees should keep their perspective, measure carefully the issues and scope of the work required in the appeal, and weigh carefully the amount of time and expense warranted by the ancillary fee proceedings. Lawyers should not assume that because they have prevailed on the merits, there is no limit to the amount of time that they can expend in the fee proceedings, even if they are contested. I recognize that the respondent was not particularly helpful by contesting trivial items and in raising issues already determined. Nonetheless, I find to be excessive the total time spent by petitioners' counsel and their associates in preparation for the fee hearings, which were of limited dimension to begin with, and the time spent in researching and assembling much of the documentary evidence.

An absence of perspective and proportionality is obvious when an aggregate of 334.84 hours is allowed counsel in the underlying proceedings, as compared with 186.35 hours allowed counsel in the fee petition application to 6/30/91, and now an updated claim for an additional 243.95 hours, or a total of 430.3 hours in the ancillary fee petition. In addition, 44.50 hours are sought for law clerks and 87.75 hours for a paralegal, for a grand total of 562.55 hours in the fee proceeding as against 334.84 hours expended on the merits.

More attorneys and law clerks worked on the fee phase of the litigation than on the merits, and many more hours were billed on this aspect of the case than were billed on the merits. The request for hourly fees on the fee application shows that the ancillary proceedings have become the major litigation that courts often fear. The enormous consumption of lawyers' time in preparation

for the fee hearings and the judicial time consumed in examining and digesting the many exhibits, documents, and memoranda submitted raise apprehension about the allocation of judicial resources. Accordingly, one-third of the hourly charges billed for lawyer time on Appendices "C" and "D" are disallowed and the charges are reduced by 14.42 hours.

As for Appendix E, I find excessive much of the time spent in preparation of charts, review and study of billing sheets, review and finalizing exhibits, and in the preparation of conclusions of law. I find that Payne spent considerably more time, in addition to the time spent by McIntyre, than was necessary at this stage of the hearings. Payne billed 101 hours during August 1991. McIntyre billed over 27 hours in the preparation of the Requests for Findings of Facts and Conclusions of Law, and Payne has also billed for the same matter an additional 55 hours (Appendix E).

The combined time claimed by McIntyre and Payne alone on the Requests for Findings of Fact and Conclusions of Law is in excess of 82 hours. At their proposed hourly rates, their billing claim for the preparation of the Request for Findings of Fact and Conclusions of Law, without any reference to the time billed by law clerks and the paralegal, amounts to a sum aggregating almost $19,000. The transcripts of the hearings, however, excluding the exhibits, filled only 310 typewritten pages. I, therefore, find that the time billed by Payne on Appendix E is unreasonable and should be reduced by one-half. The billing time is reduced to 50.50 hours.

Attorneys Heine and Cozzulino did no more than make several phone calls, apparently seeking fee information, work that might have been accomplished by a paralegal or law clerk. The billing time is allowed, but I find that their billing rate of $190 per hour is excessive. Under the evidence, their services hardly warrant as much as has been allowed per hour for Simpson and Fox. The two are allowed $125 per hour which I find to be reasonable.

As for the law clerks Harding, Sutton, Sheed and Richards, I find that 43.50 hours billed for their research on attorney's fees is excessive. I find that 21.6 hours are reasonable. By comparing the rates allowed Fox and Simpson, an allowance to the law clerks of $50 per hour is fair and reasonable. Rodriguez, as a paralegal, spent 27.50 hours in preparing an exhibit book, which I presume to be the Special Appendix. Although useful, it was largely duplicative not really necessary in these proceedings. The work primarily consisted of copying and assembling exhibits, pleadings, orders, and memoranda. However, petitioners have billed $1,925 for the preparation of this exhibit of dubious necessity. I find that 50% of the time billed for Rodriguez for his total services is fair and reasonable and that a rate of $50 per hour for him is also fair and reasonable.

Accordingly, I find the following hours, hourly rates, and amounts for the updated services through August 21, 1991, to be fair and reasonable.

NAME	HOURS	HOURLY RATES	AMOUNT
Daniel P. McIntyre	9.00 (June)	$ 170.00	$ 1,530.00
	34.75 (July)	170.00	5,907.50
	8.50 (Aug.)	170.00	1,445.00
William T. Payne	3.20 (June)	150.00	480.00
	36.75 (July)	150.00	5,512.50
	50.50 (Aug.)	150.00	7,575.00
Claude Cazzulino	.50	125.00	62.50
D. William Heine	.25	125.00	31.25
Paralegal	3.75 (July)	50.00	187.50
Robert Rodriguez	42.00 (Aug.)	50.00	2,100.00
Law Clerks			
Jack Harding			
Brenda Sutton	an aggregate of 21.6 hours	50.00	1,080.00
Frank Sheed			
John Richards			
		TOTAL	$ 25,911.25

(2) Expenses

Petitioners claim the following expenses:

Pre-Application Period (SA-451)	$ 4,248.68
Post-Application Period	563.13
Daniel McIntyre	318.68

Kathryn Simpson (Request FOF 65; SA-36; SA-38)	24.90
Schwartz, Steinsapir, et al. (Appendix A, letter-8/22/91)	2,588.90
Daniel McIntyre	621.81
(Appendix B, letter-8/22/91)	268.74
William Payne (App.D, ltr.-8/22/91)	191.75
(Appendix E, letter-8/22/91)	1,506.60
TOTAL	$10,333.19

Spang objects to petitioners' request for reimbursement of out-of-pocket expenses on the ground that this is a "mandamus" and not an "ERISA" action, and that the costs are attributable to the *appeal* rather than mandamus and therefore are not reimbursable. I believe that the memorandum opinion of 1/11/91 [sic] at page 22 resolved these objections. Spang also asserts that the only "costs" petitioners may recover are those won through a "Bill of Costs" and permitted under 28 U.S.C. § 1920.

ERISA authorizes the court in its discretion to award "a reasonable attorney's fee and costs of action." 29 U.S.C. § 1132(g)(1). Although not an ERISA case, the court in *Dowdell v. City of Apopka, Florida*, 698 F.2d 1181, 1188-89 (11th Cir. 1983), stated: "Where cost-shifting is expressly authorized by statute, the traditional limitations of Rule 54(d) and 28 U.S.C. §§ 1920 and 1923(a) do not apply." This reasoning is applicable here. The court in *Bowen v. Southtrust Bank of Alabama*, 760 F. Supp. 889, 900 (M.D. Ala. 1991) in applying the ERISA statute, awarded reasonable costs of travel, meals, lodging, postage, copying, long distance telephone, federal express, and other expenses of a wider variety than claimed here. *See also*

Hitchcock v. G & W Electric Co., No. 85-C-0667 1989 U.S. Dist. Lexis 195 (N.D. Ill. Jan. 5, 1989) (ERISA case awarding costs of local transportation and postage); *Connors v. Drivers, Chauffeurs and Helpers Local Union 639*, Civ. NO. 81-1840, slip. op. (D.D.C. March 4, 1983) (ERISA case awarding reasonable costs of photocopying, postage, transportation, and filing fees). Thus, although some of the expenses are borderline with respect to necessity, such as the enormous duplication costs and the federal express charges, they are allowed as fair and reasonable

VI. MULTIPLIER

Petitioners claim a multiplier of two, contending that they faced a "great risk that they would not prevail in the circuit, and that they would recover no fee whatsoever". (Request for Findings of Fact, p.82). They also suggest that Third Circuit precedent allow enhancement of the lodestar to compensate for such contingency risk, citing to *Blum v. Witco Chemical Corporation*, 888 F.2d, 975, 981 (3d Cir. 1989).

Spang argues that at the last minute petitioners waived their claim for a multiplier, referring to the transcript of hearing. (T1:38-40). Spang further suggests that if any award were to be made, a minimum of 33% negative multiplier should be awarded because petitioners have submitted claims for excessive, redundant and unnecessary hours, insufficiently detailed records and explanations and misconduct. (Respondents Requests for Findings, p.26).

I do not read McIntyre's statements at hearing to constitute a waiver of a contingency enhancement.

Although he stated that "we are going to make a very limited claim to a contingency multiplier," he justified that by explaining that they were not going to claim the "general" claim but to ground their argument "specifically in the appellate context," because in the appellate context there are "very precise figures" of the potential of prevailing on appeal in the federal court. On the other hand, under the more recent rulings of the Supreme Court and of this circuit, the allowance of a contingency factor is not determined by the general risk potential in obtaining a reversal in an appellate court. The rules for awarding a contingency factor have recently undergone considerable revision in this circuit.

In *Vargas v. Hudson County Board of Elections*, 949 F.2d 677 (3rd Cir. 1991), this court reiterated the requirements stated in *Rode v. Dellarciprete*, 892 F.2d 1177, 1184 (3d Cir. 1990) for contingency enhancements, again reminding that they should be granted only in rare cases.

The fee applicants must establish:

> (1) How the market treats contingency fees in a class differently from hours fee cases;
>
> * * *
>
> (4) That without any adjustment for risk the prevailing party would have faced substantial difficulties in finding counsel in the local or relevant market.

949 F.2d at 676 (citations omitted).

There is sufficient evidence in the record here to establish that the market treats contingency cases differently from hourly fee cases. The record contains convincing affidavits of Rosalyn M. Litman (Exh. P-103), and Michael Malakoff (Exh. P-108), two knowledgeable and experienced lawyers in contingency fee practice. However, the record is devoid of evidence to establish that without a risk adjustment the prevailing parties would have faced substantial difficulties in finding counsel in the relevant market as a whole to represent them in appellate proceedings. "[T]he applicant must establish difficulty or inability to obtain counsel in the case at issue before the focus shifts to a class-based determination of how much the enhancement should be." 949 F.2d at 676. The petitioners have not met this burden of proof.

There was not much of a risk factor in ultimately prevailing in the appellate court here on the underlying proceeding; the major risk was the resolution of probable contested fee proceedings in the event of success on the merits. The probability of success for the appellant-petitioners in *Delgrosso II* was very good. They had in hand the unfulfilled mandate of the appellate court in a prior appeal involving the same parties. The issues were narrow and the results highly predictable. These proceedings sought no more than the authority of the appellate court to compel the district court to carry out the directives set forth in the appellate court's prior judgment and to ensure appropriate orders with respect to each directive. Under such circumstances, the risk of losing was minimal. The petitioners have not met their burden of proof to establish any difficulty or inability to obtain counsel to represent them in the proceedings in *Delgrosso II*. The

request for a contingency enhancement is therefore denied.

VII. CONCLUSIONS OF LAW

1. ERISA represents a comprehensive effort to reform the nation's system of employee benefits. A complex and reticulated statute, it regulates both the substance of pension plans and the means through which an employer's compliance with the substantive provisions is ensured. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980).

2. In large part, Congress left enforcement to private actions by plan participants, but it recognized that the statute's success ultimately rests upon this enforcement scheme. Thus, Congress explicitly declared its goal: to provide "*ready access to the Federal courts.*" ERISA § 2(b), 29 U.S.C. § 1001(b); *see Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923, 941 (3d Cir. 1985); *Smith v. CMTA-IAM Pen. Trust*, 746 F.2d 587, 589 (9th Cir. 1984) ("The underlying purposes of ERISA are to protect the interests of participants in employee benefit plans. An important aspect of that protection is to afford them effective access to federal courts.").

3. Among the means Congress chose to secure that ready access is the fee-shifting mechanism at issue here, section 502(g)(1) of the Act, which permits a court to award fees to a participant who successfully maintains an action under the statute. 29 U.S.C. § 1132(g)(1). The section provides:

> In any action under this title by a participant, beneficiary, or fiduciary, the court in its discretion may award a reasonable attorney's fee and costs of action to either party.

4. ERISA is a remedial statute. *See Nachman*, 446 U.S. at 374; *Rettig v. Pension Ben. Guar. Corp.*, 744 F.2d 133, 155 (D.C. Cir. 1984). Remedial statutes are to be construed liberally to effectuate their purposes. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). For this reason, "ERISA's attorney's fee provisions must be liberally construed to protect the statutory purpose of vindicating retirement rights, even when small amounts are involved." *Chambless v. Masters, Mates & Pilots Pen. Plan*, 815 F.2d 869, 872 (2d Cir. 1987) ("If a plan participant or beneficiary prevails in an action to enforce his rights under the plan, he *ordinarily* should recover attorneys' fees in the absence of special circumstances making an award unjust."). *See Smith v. CMTA-IAM Pension Trust*, 746 F.2d at 589; *see also Gunderson v. W.R. Grance Long Term Dis. Income Plan*, 874 F.2d 496, 500 (8th Cir. 1989) (explaining that "[t]he burden of proving that [such] special circumstances exist is on the losing defendant").

5. This circuit counts ERISA's fee provision among the growing number of "fee-shifting" statutes – such as the civil rights statutes – which Congress has enacted in recent decades. *See* October 8, 1985 Report of the Third Circuit Task Force on Court Awarded Attorney Fees, 108 F.R.D. 237, 242-44 and note 16 (citing the ERISA fee decision of *Ursic v. Bethlehem Mines*, 719 F.2d 670 (3d Cir. 1983), as an example of cases construing these types of statutes). Under these fee-shifting statutes, plaintiffs should recover fees as long as they "succeed" on any

significant issue. *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1985); *Texas State Teachers v. Garland Indep. School Dist.*, 489 U.S. 782 (1989); *SPIRG v. A.T.&.T Bell Lab.*, 842 F.2d 1436, 1455 (3d Cir. 1988). "Usually a common-sense comparison between relief sought and relief obtained will be sufficient to indicate whether a party has prevailed." *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 895, 911 (3d Cir. 1985); *see also Clark v. Township of Falls*, 890 F.2d 625, 627 (3d Cir. 1989).

6. For reasons set forth in the memorandum dated January 19, 1991 [sic], filed contemporaneously with this report,

(a) the mandamus action will permit an award of counsel fees and expenses,

(b) the services performed by participants' counsel in the appeal component of *Delgrosso II* and the mandamus action were not discrete and separate, but intertwined in the common objective to obtain appellate review.

7. The petitioners prevailed in the underlying proceedings in *Delgrosso II* and there was a causal connection between the litigation they pursued and the relief obtained. *See Institutionalized Juveniles*, 758 F.2d at 897. The Special Master concludes that an award of reasonable fees and expenses would further ERISA's goal of insuring ready access to the courts.

8. Although they prevailed in the appeal in *Delgrosso I*, petitioners' application for attorneys' fees for services rendered was not filed within a reasonable time and for further reasons set forth in the memorandum of

January 29, 1991, I conclude that the request for fees in that appeal must be denied.

9. Attorneys' fees and expenses for John J. Kearns III are denied, not only because they are duplicative, but also because he was appointed pursuant to the decision of the court of appeals in *Delgrosso I* as "a representative for the vested participants to represent them in the selection of an independent Plan Administrator, and not as counsel for the participants, or any of them." See Memorandum of January 19, 1991, at pp. 23-24.

10. Petitioners' request for attorneys' fees and expenses in *Delgrosso II* should be granted to the extent that they are reasonable in the rates and hours claimed and not non-duplicative.

11. Petitioners may appropriately assert a claim for William T. Payne's services, provided that any fees earned by him in *Delgrosso II* to July 5, 1991, are paid into a trust fund or separate union legal representation fund, as the court of appeals may determine.

12. As have some of the other circuits, this court has enunciated certain factors to be analyzed in determining whether to grant attorneys' fees under 29 U.S.C. § 1132(g)(1). *Ursic v. Bethlehem Mines*, 719 F.2d at 673. These factors are (a) the degree of the opposing party's culpability or bad faith; (b) the opposing party's ability to satisfy an award of attorney's fees; (c) the deterrent effect of an award against the offending parties; (d) the benefit conferred on the other participants in the pension plan as a whole; and (e) the relative merits of the parties' positions. Not all of the factors are relevant in a given case and "no single factor is necessarily dispositive." *Firestone*

Tire & Rubber Co. v. Neusser, 810 F.2d 550, 558 (6th Cir. 1987). Here, consideration of the five factors favors an award of fees:

> (1) In *Delgrosso I*, the court of appeals held that "Spang breached its fiduciary duty by failing to administer the Plan in accordance with the governing documents, i.e., the Pension Agreement." 769 F.2d at 936. This should satisfy the Ursic culpability factor.
>
> (2) A fee award will deter other employers from attempting to take pension fund assets as Spang did. In fact, such award is the only true deterrent in light of controlling authorities which hold that punitive damages are not recoverable under ERISA. *Pane v. RCA Corp.*, 868 F.2d 631, 635 n.2 (3d Cir. 1989).
>
> (3) The results which participants' counsel achieved will result in a plan-wide recovery of more than $2 million for all pension plan participants.
>
> (4) As shown by the results achieved, participants' position on the merits was considerably more sound than Spang's.
>
> (5) Spang has never claimed an inability to turn over the money it has appropriated, let alone to satisfy an award of fees and costs.

13. Petitioners are not precluded from seeking a reasonable fee award for reasonable hours expended on the fee application after June 30, 1991, because of Spang's offer to stipulate in its letter of June 19, 1991, to a specific sum to be awarded by the Master for attorneys' fees

attributable to the fee petition and underlying proceedings through June 30, 1991. That offer was conditional and would not have terminated the litigation.

14. The award will not be reduced for any alleged lack of success by participants as to particular motions or legal issues. *See SPIRG v. AT&T,* 842 F.2d at 1455. It is immaterial that the court of appeals rejected one of participants' theories as to appellate jurisdiction or may have technically denied one of participants' motions. Any prolonged case will encompass efforts which succeeded and those that failed. This is so because cautious lawyers present different or alternative legal theories or factual analysis in support of the particular relief sought. Some of these may not succeed even though, in the end, the litigant is substantially successful in his claim as a whole. Were fee awards limited to initiatives that succeeded, then a fee application would require a court to analyze each of the attorney's efforts to catalog which succeeded and which failed. *Hensley,* 461 U.S. 424, which *SPIRG* follows, freed courts from such time-consuming analysis. *Hensley* holds that a court must assess the nature of the plaintiff's claim and whether, as to that claim, he has largely succeeded.

15. The "initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *SPIRG,* 842 F.2d at 1441 (quoting *Blum v. Stenson,* 465 U.S. 886, 888 (1984)). The court determines the reasonable hourly rate or "lodestar" for each attorney by assessing the experience and skill of the

attorneys and comparing their rates to those of comparable lawyers in the private business sphere and in public interest law.

16. Although Payne's hourly compensation costs, based on his salary and overhead during the time he worked for USW, may have been less than the market, this should not diminish his recovery. *Blum v. Stenson* provides ample support for this determination. In *Blum*, defendant contended that payment of market rates to in-house attorneys of the non-profit Legal Aid Society of New York would be inappropriate, because the actual cost of employing these salaried attorneys was much less than the market rate. The Supreme Court rejected this argument, and held:

> The statute and legislative history establish that "reasonable fees" under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel.

465 U.S. at 895 (footnote omitted).

17. The hourly rates allowed are based on the current prevailing market rate and therefore no special delay enhancement is allowed. *See Institutionalized Juveniles*, 758 F.2d at 923 & n.41 ("Using current market rates to calculate the lodestar figure may counterbalance the delay in payment as well as simplify the task of the district court.").

18. Contingency fee enhancements under current law of this circuit are granted only in rare cases. The petitioners have not established that the prevailing party

would have faced substantial risk in finding counsel in the local market to represent them in the appellate proceedings in *Delgrosso II*. The multiplier is, therefore, not allowed.

VIII. CONCLUSION

The findings of fact and conclusions of law contained in the foregoing report constitute the Special Master's recommendations to the court of appeals. In accordance therewith, the Master recommends a total award for petitioners' counsel in *Delgrosso II* aggregating $120,005.75 and expenses aggregating $10,333.19.

Pursuant to the court's order of reference of August 13, 1990, the parties are allowed ten (10) days after notice from the Clerk of the Court that the Master's report has been lodged to file with the Clerk of the Court and serve any written objections and recommendations that they may have to the report. The failure to timely object may result in a waiver of any further right to review.

/s/ Max Rosenn
MAX ROSENN
Special Master

Dated: March 13, 1992

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Report of the Special Master by mail this 13th day of March 1992 on the following counsel for the parties:

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/s/ Barbara T. Sabol
Barbara T. Sabol
Secretary to the Special Master

Dated: March 13, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3573

MATTHEW A. DELGROSSO, JAMES P. BLAIR, LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RACZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, HUBERT J. LEE

v.

SPANG & COMPANY,

Matthew A. Delgrosso, James P. Blair, Lester Ware, Jimmie Mines, Jr., Joe Henry, Robert C. Trainer, Jay T. Richler, Robert Hardwick, Jerome J. Phillips, Sr., Gilbert Weese, Larry K. Hill, Charles G. Church, Jr., John R. Alves, Barry K. Racz, Donald Lee Adams, Charles Woodrum, Richard W. Martineau, Hubert J. Lee, as well as the unnamed plaintiff vested participants,

Appellants

No. 89-3677

MATTHEW A. DELGROSSO, JAMES P. BLAIR, LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RACZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, HUBERT J. LEE

Petitioners

v.

SPANG AND COMPANY,

Respondent

HONORABLE ALAN N. BLOCH,

Nominal Respondent

(Civil Action No. 82-2672)

BEFORE: GREENBERG, SCIRICA and SEITZ, *Circuit Judges*

ORDER DENYING OBJECTIONS TO THE SPECIAL MASTER'S REPORT AND RECOMMENDATION AND AWARDING COUNSEL FEES AND EXPENSES

On August 10, 1990, pursuant to Fed. R. Civ. P. 53; *see also* Third Circuit Rule 27(2), Senior Judge Max Rosenn of this court was appointed Special Master on plaintiff's

petition for attorney's fees and expenses relative to two matters before this court in which they claimed they obtained favorable decisions, *Delgrosso v. Spang & Co.*, 769 F.2d 928 (3d Cir. 1985), *reh. denied*, (1985), *cert. denied*, 476 U.S. 1140 (1986), and *Delgrosso v. Spang & Co.*, 903 F.2d 234 (3d Cir. 1990), *reh. denied* (June 18, 1990).

On March 16, 1992, the Special Master filed his report and recommendation to the Court of Appeals recommending a total award for petitioners' counsel in *Delgrosso II* aggregating $120,005.75 and expenses aggregating $10,333.19.

After reviewing respondent's objections to the Special Master's report and recommendation and respondent's and petitioner's briefs, the objections are overruled and the Special Master's report and recommendation is affirmed.

Petitioner is awarded counsel fees in *Delgrosso II* aggregating $120,005.75 and expenses aggregating $10,333.19.

BY THE COURT:

/s/ Anthony J. Scirica, J.
Circuit Judge

DATED: JUL 20 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3573

MATTHEW A. DELGROSSO, JAMES P. BLAIR, LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RACZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, HUBERT J. LEE

v.

SPANG & COMPANY,

Matthew A. Delgrosso, James P. Blair, Lester Ware, Jimmie Mines, Jr., Joe Henry, Robert C. Trainer, Jay T. Richler, Robert Hardwick, Jerome J. Phillips, Sr., Gilbert Weese, Larry K. Hill, Charles G. Church, Jr., John R. Alves, Barry K. Racz, Donald Lee Adams, Charles Woodrum, Richard W. Martineau, Hubert J. Lee, as well as the unnamed plaintiff vested participants,

Appellants

No. 89-3677

MATTHEW A. DELGROSSO, JAMES P. BLAIR, LESTER WARE, JIMMIE MINES, JR., JOE HENRY, ROBERT C. TRAINER, JAY T. RICHLER, ROBERT HARDWICK, JEROME J. PHILLIPS, GILBERT WEESE, LARRY K. HILL, CHARLES G. CHURCH, JR., JOHN R. ALVES, BARRY K. RACZ, DONALD LEE ADAMS, CHARLES WOODRUM, RICHARD W. MARTINEAU, HUBERT J. LEE

Petitioners

v.

SPANG AND COMPANY,

Respondent

HONORABLE ALAN N. BLOCH,

Nominal Respondent

(D.C. Civ. No. 82-2672)

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO and ROTH, Circuit Judges

SUR PETITION FOR REHEARING

The petition for rehearing filed by Spang & Company in the above-entitled cases having been submitted to the judges who participated in the decision of this Court and

to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and the majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the Court in banc, is denied.

BY THE COURT:

/s/ Anthony J. Scirica
Circuit Judge

DATED: SEP 03 1992